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Supreme Court of the United States.

WILLIAM J. BUTTFIELD, Plaintiff in Error, vs. NEVADA N. STRANAHAN, Collector of the Port of New York, Defendant in Error.	No. 294.
WILLIAM J. BUTTFIELD, Plaintiff in Error, vs. GEORGE R. BIDWELL, Defendant in Error.	No. 296.
WILLIAM J. BUTTFIELD, Claimant of Seven Packages of Tea, Plaintiff in Error, vs. THE UNITED STATES, Defendant in Error.	No. 516.

BRIEF FOR PLAINTIFF IN ERROR IN EACH OF THE ABOVE ACTIONS.

William J. Buttfield has sued out a writ of error in each of the above actions for the purpose of reviewing the judgments entered therein.

The judgment in the action brought by Mr. Buttfield against Nevada N. Stranahan, Collector of the port of New York (No. 204), was entered upon the verdict of a jury found by the direction of the Court in favor of the defendant dismissing the complaint.

The judgment in the action brought by Mr. Buttfield against George R. Bidwell, Collector of the port of New York (No. 206) was entered upon a verdict found by the direction of the Court in favor of the defendant dismissing the complaint.

The judgment in the action brought by the United States against Seven Packages of Tea was rendered in favor of the plaintiff for a forfeiture of the seven packages of teas of which Mr. Buttfield was the claimant.

In each of these actions the plaintiff in error based his right of recovery upon the unconstitutionality of the Act of Congress passed March 2, 1897.

I.

An outline of the Act of March 2, 1897.

The act is entitled "An Act to prevent the importation of impure and unwholesome tea."

Section 1 renders it unlawful for any person to import any merchandise as tea "which is inferior in purity, quality and fitness for consumption to the standards provided in Section 3 of the Act, and the importation of all such merchandise is hereby prohibited."

Section 2 requires the Secretary of the Treasury to appoint a board, to consist of seven members, experts in teas, to prepare and submit to him standard samples of tea.

Section 3 directs the Secretary of the Treasury, upon the recommendation of said board, to "fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported

into the United States," and to deposit samples in certain custom houses, and provides that "all teas or merchandise described as tea, of inferior purity, quality or fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof."

Section 4 provides for the examination of teas entered in the Custom House by the tea examiner.

Section 5 provides that if, after such examination, the tea is found by the examiner to be equal in purity, quality and fitness for consumption to the standard, a permit shall be granted to the importer, declaring the tea free from the control of the customs authorities, but if it is found to be inferior in purity, quality and fitness for consumption to the standard, the importer shall be notified, and the tea shall not be released, unless a re-examination is called for by the importer.

Section 6 provides that if such re-examination is called for, "the matter in dispute" shall be referred for decision to a board of three United States General Appraisers, and if such board finds the tea in question to be equal in purity, quality and fitness for consumption to the proper standards, a permit shall be issued by the Collector for its release and delivery to the importer, but if not the importer shall give a bond to export the tea out of the limits of the United States within a period of six months after such final re-examination, and if the same shall not have been exported within the time specified, the Collector at the expiration of that time shall cause the same to be destroyed.

Section 9 provides as follows: "That no imported teas which have been rejected by a customs examiner or by a board of United States General Appraisers, and exported under the provisions of this Act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition."

II.

Statement of facts in Buttfield vs. Stranahan. (No. 294.)

This was an action of trespass. The complaint sets out (Record, p. 3) that the plaintiff was the owner of eight packages of tea imported at New York by the Steamer *Adana*, marked as described, and stored in a bonded warehouse in the Borough of Brooklyn, City of New York; that on the 7th of November, 1902, the plaintiff tendered to the defendant Collector of Customs at that Port, the customs duty payable upon said teas, and demanded delivery; that on the 8th of November, 1902, the plaintiff applied to the defendant for an export permit, which was refused; and on the 16th of November, 1902, the defendant wrongfully seized, removed and destroyed the teas.

The action was originally brought in the Supreme Court of the State of New York, and was removed by the United States Attorney for the Southern District of New York by a writ of *certiorari* into the United States Circuit Court for the Southern District of New York (p. 5).

The defendant appeared and answered, admitting that he was the Collector of Customs at the port of New York, but denying every other allegation of the complaint (fol. 9).

The case was brought to trial before Mr. Justice Coxe, and a jury. It was stipulated on the trial that the plaintiff duly tendered to the defendant the amount payable as duties on the teas, and demanded the teas, and that the defendant declined to accept the duties or to deliver the teas; that afterwards and before the commencement of this action the defendant ordered that the teas be taken to the United States Public Stores for destruction, and "that the said teas were thereafter removed by the defendant from the place where they were stored to the United

States Public Stores and were there destroyed by the defendant" (fol. 4).

It was further admitted that the packages of tea in question were entered by the plaintiff's firm at the Custom House in the City of New York on January 21, 1902; that they were examined by the examiner of teas at that port and were rejected as "inferior to standard in quality"; that the plaintiff's firm appealed to the Board of United States General Appraisers who afterwards certified that "the said tea is inferior in quality to the standard prescribed by law," and accordingly overruled the appeal; that the plaintiff's firm was notified of this decision on March 12, 1902, and it was admitted "that said teas were in fact inferior in quality to the said standard, provided that by quality is meant taste and flavor (the plaintiff not, however, conceding that the Act of 1897 is constitutional or that the standard was lawfully fixed by the Secretary of the Treasury)" (Record, fols. 5, 6, 7).

The evidence shows that the plaintiff applied to the defendant for a permit to withdraw the teas for consumption; that application was refused on the ground that the teas had not been released under the Act of March 2, 1897 (Plaintiff's Exhibit I, fol. 8). The plaintiff then tendered the duties, which the defendant declined to accept, because they were not accompanied by a withdrawal order and a permit (pp. 13, 14).

Afterwards, the plaintiff demanded delivery of the teas for export, which the defendant denied on the ground that the six months, fixed by the Act of March 2, 1897 in which exportation was allowed, had already expired, and notified plaintiff that "the tea will be ordered to the United States public stores for destruction" (pp. 16, 17).

The plaintiff was called as a witness in his own behalf and after having testified that he was the owner of the teas (fol. 28) which were stored in a warehouse in Brooklyn, and that he had made the various tenders and demands referred to above,

further stated that he was a citizen of New Jersey and of the United States; that the teas in question were classified as "Country Green Teas," and he produced a schedule of Country Green Teas, arranged in order of quality (p. 19, Exhibit No. 8). He stated that the Government standard of Country Green Teas No. 7 established by the Secretary of the Treasury under regulations of March 31, 1901 was the standard in force at the time of the rejection of these teas; that this standard was a "Finest Teenkai" corresponding to quality No. 4 on Exhibit 8, and that it excluded all teas below No. 6 on Exhibit No. 8, that is eleven out of the seventeen grades of quality; that the quality of the rejected teas was an "On Fine Teenkai" corresponding with No. 7 on Exhibit 8; that in style and appearance the teas were second in grade; that in cup quality or quality that is in taste and flavor, they were the seventh on Exhibit 8; that they were absolutely pure, entirely genuine and free from adulteration and that there was nothing about the teas that indicated in any way that they were unwholesome or unfit for consumption, and that the average quality of Country Green Tea is higher than that of other kinds of teas imported into this country.

Several experts were called who testified that the standard for Country Green teas of the year 1901 was, as shown on Exhibit 8, a Finest Teenkai; that it excluded all the grades below No. 6 on said exhibit, that is, that it excluded the eleven lower grades all of which were pure and wholesome and fit for consumption, with the exception possibly of the two lowest, and that the standard would exclude all Fychow and Wenchow teas which had been ordinary subjects of commerce in this country and which were pure, wholesome and fit for consumption (Thorn, fol. 48); that the rejected teas in question were not in any degree impure, were genuine tea leaves, free from adulteration and that there was nothing whatever about their grade or quality which rendered them unfit for consumption; that

they were slightly inferior in flavor to the standard, and that was the only difference (Thorn, fol. 48). Mr. Thorn testified that the rejected tea "was a higher grade of tea than the standard, the standard was a Hyson, and this was a first Gunpowder. I didn't see any spurious or exhausted leaf among this tea. It would not be possible to say that these teas were in any sense of low quality or grade of tea" (fol. 44). This testimony was corroborated by Mr. Joseph H. Lester, a witness called for the plaintiff (p. 26).

The defendant called as a witness Mr. George Hewlett, who said that he was the vice-president of the National Tea Association of the United States, and also Chairman of the Board of Tea Experts of the Treasury Department, and had held that last named office for the past five years. He said that the standard for Country Green teas as shown upon Exhibit 8 was a Hyson of a fine Teenkai chop, and that this standard was adopted because at the time the Board could not find a Hyson of lower grade in the New York market.

On cross-examination, he testified as follows: "This standard Country Green tea No. 7 for the year 1901, the tea we are discussing, is a fine quality of tea. I should say that there were not a good many qualities of tea below that standard that were entirely palatable. In my opinion there were grades inferior to No. 7 that were perfectly pure, genuine tea leaves, free from adulteration and different from standard only in flavor. That was true in regard to these teas in question—the eight packages—that they differed from the standard only in flavor, that is, the flavor in my opinion was decidedly inferior to the flavor of the standard, that is the only distinction that I found between these teas and the standard" (p. 29, fol. 61).

He testified also that the rejected tea in question was a pure tea, but of a low quality (fol. 56), and that he would grade it as No. 11 on Exhibit 8.

On further redirect-examination he testified that

in his opinion there were no teas in the market in the necessary quantity at the time the standard was selected that could be obtained that were pure, and that were inferior in cup quality to these teas which were selected as a standard, and that could be bought in the necessary quantity for use as Government samples, and "while such teas are produced they were not available for selection when the board was in session for the selection of samples" (fol. 62).

The evidence of this witness as to the difficulty of obtaining samples of inferior grades of Country Green Teas which were, in his opinion, suitable for a standard, although such grades existed, was met by the testimony of the plaintiff's witnesses to the effect that there were thousands of packages of Country Green Teas admitted under the standard for the year 1900, pure and fit for consumption of lower quality than the standard from which such selection might be made then in this country (fols. 70, 72, 74). The evidence also showed that if the standard No. 7 had been enforced 75 per cent. of the entire crop of Country Green Teas would have been excluded, and that if a similar standard of quality had been applied to other classes of teas 75 to 80 per cent. of all the teas that are usually imported into this country would have been excluded (fol. 71).

One witness said: "If this standard of fineness, &c., adopted as the standard in this particular case of Country Green Tea had been employed as the standard in the general body of teas, about the same proportion of the general crop would have been excluded as that of green tea; three-fourths of the crop" (fols. 75, 76).

At the conclusion of the evidence the Court directed a verdict for the defendant upon the motion of the defendant's counsel.

The plaintiff's counsel raised the question of the constitutionality of the law upon several grounds, and the Court directed a verdict for the defendant, dismissing the complaint on the merits, with costs.

III.

Statement of facts in the case of Buttfield vs. Bidwell, No. 296.

This was an action of trespass on the case for damages sustained by the plaintiff by reason of the alleged wrongful act of the defendant in refusing to permit him to bring certain teas into the United States, and threatening to destroy the same unless removed within six months.

The action was brought in the Circuit Court of the United States for the Southern District of New York on the ground of diversity of citizenship and also as arising under the constitution and laws of the United States.

The complaint (Record, p. 3) alleged that the plaintiff's firm was engaged in the business of importing and dealing in teas in the City of New York, and that the defendant was the Collector of the Port of New York. That on the 14th of December the defendant, under color of his office, and by the improper exercise of his powers and authority, unlawfully prevented the plaintiff's firm from importing two hundred and twenty-six packages of Country Green Tea, shipped from China and consigned to them by the steamer *Arara*; that the teas were of a class known as Country Green Teas, and were subject to duty, and were duly entered with the defendant as Collector; that they were examined by the tea examiner, who reported that they were inferior in quality to the standard, and the defendant notified the plaintiff that the teas were prohibited from importation into the United States; that the plaintiff protested against the finding of the examiner and the Board of General Appraisers, who thereafter reported to the defendant that the teas were inferior in quality to the standard, and that the defendant notified the plaintiff that his protest was overruled; that the defendant thereupon refused to permit the plaintiff to

withdraw the teas for consumption, and refused to permit the plaintiff to take any other action regarding the said teas, except to export them; the complaint further alleges (p. 7) that the action of the defendant was taken under the Act of 1897, which is void as being in violation of the Constitution of the United States, that the Secretary of the Treasury was not authorized by the said act to fix the standard known as No. 7 for Country Green Teas, and that in so doing he exceeded his powers, and that the teas offered for import were of a high grade in quality, wholesome, free from adulteration and fit for consumption, and were entitled to be admitted into the United States as lawful importation upon payment of duties.

The complaint set up a second cause of action in substantially the same language with regard to twelve hundred and seventy-five packages of Country Green Teas imported by the steamers *Glengyle* and *Ataka* (fol. 9), and a third cause of action of similar import with regard to one hundred and eighty-nine packages imported by the steamer *Satsuma* (fol. 10), and a fourth cause of action of similar import with regard to two hundred and fifty-eight packages of tea imported by the steamer *Adana* (fol. 11). The plaintiff alleged by reason of the unlawful acts of the defendant he sustained damages in the sum of twenty-eight hundred ($2,800) dollars, with interest.

The defendant answered, admitting that he was the Collector of Customs at the Port of New York, denying on information that the plaintiff was a resident of the State of New Jersey, and absolutely denied each of the other allegations of the complaint (fol. 14).

The action was brought to trial before Mr. Justice Coxe and a jury. The entry of the teas by the *Satsuma* was proven (fol. 10, Exhibit No. 4) and it was admitted that the teas arriving by the *Ataka*, *Adana* and *Glengyle* were entered in the same form as Exhibit No. 4; that the invoices for

each shipment were filed with the defendant in the same form as Exhibit No. 2, referring to teas by the *Satsuma*, and that upon the invoices there was stamped the tea examiner's ground of objection, as set out in Exhibits 3, 6, 7 and 8 (fol. 12). From these exhibits it appears that one hundred and eighty-nine packages or half chests from the steamer *Satsuma* were rejected by the examiner as "inferior to standard in quality;" that six hundred and five packages from the steamer *Ataka* were rejected by him as "inferior to standard in quality;" that eighty-seven packages therefrom were rejected by him as "smoky Fychows, inferior to standard in quality;" that two hundred and fifty-eight packages from the steamer *Adana* were rejected by him as "inferior to standard in quality;" that four hundred and thirty-five packages from steamer *Glengyle* were rejected by him as "inferior to standard in quality, and that one hundred and forty eight packages therefrom were rejected by him as "inferior to standard in quality—smoky Fychows" (p. 14).

It was stipulated that a protest was made by the plaintiff against the findings of the tea examiner regarding the teas shown upon Exhibits 3, 6, 7 and 8, and that the matter was brought for decision before the Board of United States General Appraisers, said protest resulting in the ruling shown in Exhibit 9 (p. 16), and a similar ruling with regard to the other teas (fols. 19, 20).

The ruling of the Board of General Appraisers, shown by Exhibit No. 9, was that "the said tea is inferior in qua[illegible] to the standards prescribed by law" (fol. 20).

Under the course of business at the Custom House with regard to tea importations no teas can be withdrawn before a ruling has been made and reports filed by the tea examiner, nor can duties be paid before such ruling releases the teas (fol. 20). No teas are released, neither can any be withdrawn from bond, until the examiner or the Board of

General Appraisers has reported in favor of such release (fols. 24 and 27). A release in printed form is required headed "Permit for Release of Imported Tea." A copy of this form is set out at folio 26. An importer cannot remove or withdraw for consumption from a bonded warehouse, teas which have been entered, without first obtaining a report of the tea examiner, or of the Board of General Appraisers, that the teas are equal to the standard in purity, quality and fitness for consumption, nor can he pay the duties before such report is presented. An offer to pay duties would be useless (fol. 28). Before teas can be landed a permit must be issued directing the teas to be sent to a designated bonded warehouse (p. 21).

The plaintiff testified (p. 22) that he had been engaged in the business of importing teas into the United States for fifteen years, and on an average imported about twenty per cent. of all the teas imported at the port of New York (fol. 35). He stated that the standard No. 7 for Country Green Teas was established by the regulation of the Secretary of the Treasury March 31, 1901; that Country Green Teas are grown in a certain district in China and are distinct from Ping Suey green teas, which are also grown in China (fol. 36). They are divided into five classes, known as Moyune, Teenkai, Fychow, Wenchow and Shanghai packed (fol. 37). He produced a schedule of Country Green Teas arranged in order of quality, marked Exhibit No. 12 (corresponding to Exhibit No. 8 in Buttfield *vs.* Stranahan).

It was admitted that a certain prescribed quantity of physical tea was made the standard for the year 1901 by the selection of the board of tea experts and the approval of the Secretary of the Treasury, and that if quality means taste and flavor, the plaintiff's importations involved in the present case are not up to the Standard No. 7 for Country Green Tea established by the Secretary (fol. 43). The witness stated that the quality of Standard No. 7 for 1901 was of

finest Teenkai, as shown on Schedule No. 12; that of the qualities specified on that schedule, numbers 6 to 15 are pure, wholesome and fit for consumption and free from adulteration, and have been ordinary subjects of commerce; that most of them were admissible under the standards fixed by the Secretary previous to 1901; that the teas in question offered for import were pure, of genuine tea leaves, wholesome and fit for consumption; that there was nothing about the teas to render them unsuitable as articles of food; that the standard for Ping Suey teas for 1901 was very much inferior in quality to Standard No. 7, and that the teas offered for import and rejected in this case were all superior to the standard for Ping Suey teas, and were all equal to the Country Green standard established previous to March 31, 1901, and are equal to the standard established after 1901, that is, for 1902 (fols. 52, 53), and that teas of the same class, which were rejected in 1901, have been admitted under the standard for 1902 (fol. 53).

The plaintiff produced notices from the defendant of the rejection of the teas in question (pp. 29, 30; fols. 56-60), and his protest to the defendant against the rejection (p. 32, Exhibit 16). He testified that he was compelled to sell for export or export the teas, and that the difference between the amount he realized upon a sale of the teas and the value at the Port of New York at time of rejection was two thousand two hundred and eighty-one and $\frac{19}{100}$ ($2,281.19) dollars (fol. 67).

On cross-examination the plaintiff produced a schedule of the grades and qualities of the different teas which are the subject of this action (p. 36, Exhibit 18). He called two expert witnesses who testified to the correctness of Schedule Exhibit 12 (fol. 88). They both testified that the standard was finest Teenkai, as shown on that schedule (fol. 89, fol. 117); that all teas above the upper line drawn across Exhibit 12 were admitted and that all below that line should be excluded under the standard (fol.

89, fol. 118). Mr. Gillet testified that the only teas below the standard unfit for consumption are mixed Shanghai packed and adulterated Shanghai packed; that common Wenchow teas were frequently fit for consumption. Above that grade all teas were pure teas, and fit for consumption and proper articles of food (fols. 91, 92). He produced a schedule of the teas in suit, showing their grade as to quality (p. 41, Exhibit 19).

Mr. Thorn testified that the standard excluded all Fychow and Wenchow teas, and that a great many of them are ordinary subjects of commerce and fit for consumption; that the standard for country green teas was much higher than that for Ping Suey teas (fols. 118, 119). He also produced a schedule showing the grades and qualities of the rejected teas in question. He testified that the teas were not in the slightest degree more deleterious to health than other kinds of tea; were absolutely pure and free from adulteration; were genuine and free from spurious and exhausted leaves, and that there was nothing about them to indicate or suggest that they were presumably impure, unwholesome or unfit for consumption (fols. 127, 128); that they were all very much better than the Ping Suey standard for the same year, and that they were all above the grade 9 on the Schedule No. 12; that they were such teas as were largely dealt in previous to 1901 (fol. 129).

When the plaintiff offered to produce further expert testimony upon this subject, the Court said:

"It seems to me it is undoubtedly a question of law upon this record, and I think that you, Mr. Bishop, have already sufficient evidence to warrant a direction of a verdict in your favor, provided you are correct upon the law question; that is, that this act is unconstitutional, and if it be constitutional and the Secretary has improperly excluded the teas, and if it is to be construed as you contend it is, then you have made a case. Otherwise you have not. Therefore, it does not strike me as at all material to

multiply the expert testimony. We want to get this record so that the question will be finally determined by the Supreme Court. I want it perfectly clear that the plaintiff has made a case upon the facts, provided the law is with him" (fol. 159).

It further appeared that the average annual importation of teas into the United States was approximately ninety million pounds (fol. 161). The average annual importation of Country Green teas is from six million to eight million pounds, and that two-thirds of the total crop of Country Green teas will be excluded under the standards of 1901 (fol. 162).

The defendant's counsel moved for a direction of a verdict on the ground that the act is constitutional, and that it is for the Secretary to decide as to the standard which is to be adopted, which decision cannot be reviewed by the Court in this action, and that there is not sufficient evidence that the Secretary of the Treasury has acted in any way improperly; also on the ground that assuming the act to be unconstitutional, or if it were assumed that the Secretary had acted improperly in the matter, no cause of action in tort is established against Mr. George R. Bidwell (fols. 166, 167).

Plaintiff's counsel asked for a direction of a verdict upon the ground that the act is unconstitutional, and that if constitutional, the Secretary of the Treasury had established a standard which was unwarranted by the law, and it afforded no protection to the defendant in rejecting the teas.

The Court ordered a verdict for the defendant dismissing the complaint on the merits, with costs.

IV.

Statement of facts in the case of United States against Seven Packages of Tea. No. 516.

This was an action to forfeit seven packages of tea, pursuant to the ninth section of the Act of

1897, which reads as follows: "That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers and exported under the provisions of this act shall be re-imported into the United States under the penalty of a forfeiture for a violation of this prohibition."

The information states that on April 29, 1902, at the Bartlett Stores, in Brooklyn, the Collector of the Port seized seven packages of tea of the value of ninety-two dollars, as forfeited under the provisions of this act, and states as the cause of forfeiture that the teas were the property of William J. Buttfield, and were re-imported by him, with knowledge of proceedings previously had; that these seven packages of tea had been previously imported by Buttfield into the United States, and had been rejected by the customs examiners and by a board of general appraisers, under the provisions of the Act of March 2, 1897, and that Buttfield executed a bond for the removal of the teas, and that he exported the teas under the conditions of the bond, and subsequently re-imported them on the 3d of April, 1902.

Mr. Buttfield appeared and claimed the teas, and filed a demurrer to the information, arguing that the act was unconstitutional. The Court overruled the demurrer, and entered judgment for the forfeiture of the tea.

Assignment of Errors in the Straubenzee Case.

The plaintiff assigned as error that the Court directed a verdict for the defendant dismissing the complaint, because on the conceded facts the defendant had destroyed his property without warrant of law if the Act of 1897 was unconstitutional, or if the standard for country green teas fixed by the Secretary of the Treasury by regulations of March, 1901, was unauthorized by law.

The assignment of error specified the grounds

of unconstitutionality in substance, that the act deprived the plaintiff of his property without due process of law, in that it prohibited him from trading in tea, except at the unregulated discretion of the Secretary of the Treasury, and because it unnecessarily, unreasonably and arbitrarily prohibited the importation of a wholesome article of commerce, and because it permitted an unjust discrimination in teas which might be imported by dealers in different classes of teas, and because the plaintiff was deprived of his property without due process of law, in that he was not given such a hearing before the rejection of his teas as he is entitled to, and because he was deprived of his property, which was destroyed, without a judicial hearing (see Assignment of Errors, p. 41).

Assignment of Errors in the Bidwell Case.

The plaintiff assigns as error that the Court directed a verdict for the defendant dismissing the complaint, and that a verdict should have been directed in his favor, because the defendant prohibited and prevented him from bringing into the United States teas which were the subject of the action and which he had a legal right to bring in, and that the defendant was, therefore, liable for the damages sustained by the plaintiff by reason of his unlawful act; that the Act of 1897 afforded him no protection in the rejection of the teas for the reason that it is unconstitutional, because it deprived the plaintiff of his liberty and property and property rights without due process of law, in that it prevents the plaintiff from trading in tea in the unregulated discretion of the Secretary of the Treasury, and prohibits him unnecessarily, unreasonably and arbitrarily from importing wholesome teas, and that it permits unjust discrimination in the importation of teas by dealers in different classes of teas, and that he was also deprived of his property rights without due process of law in that

the teas were rejected and prohibited from importation without due notice and hearing, and further, that the standard established by the Secretary of the Treasury for Country Green teas was illegally established and afforded no protection to the defendant (see Assignments of Error, Record, p. 71.)

Assignments of Error in Seven Package Case.

The plaintiff in error assigns as error that the Court overruled the demurrer to the information because no forfeiture of the tea could be legally had under the provisions of the Act of March 2nd, 1897, since that act violates rights secured to the plaintiff under the Constitution of the United States, in that it attempts to deprive him of his property without due process of law, and that the act is also unconstitutional because Congress thereby delegates the power to regulate commerce to the Secretary of the Treasury and a board appointed by him. In amplification of the charge that the act deprives the plaintiff of due process of law, the specifications are that it deprives him of his right to pursue a lawful industry—the importation of teas—except at the arbitrary will of the Secretary of the Treasury, and that the act does not provide for notice or an opportunity to attend and be heard before the rejection of teas by the Examiner or by the Tea Board of General Appraisers.

POINTS.

I.

The Act of 1897 is unconstitutional, because (1) it makes the right to import tea depend upon the arbitrary

action of the Secretary of the Treasury and a board appointed by him, and (2) excludes from import wholesome, genuine and unadulterated tea, and (3) discriminates unequally in the admission of the different kinds of teas for import, and in the right to sell and purchase tea.

1. *The act confers upon the secretary and the board the uncontrolled power to fix standards of purity, quality and fitness for consumption, and thus to prescribe arbitrarily what teas may be imported and dealt in.*

(1.) The construction of the statute came before the Court for the first time in *Sang Lung* v. *Jackson*, 85 Fed. Rep., 502 (N. D., of Cal., 1898, De Haven, Dist. Judge). That action was brought by a great number of resident aliens, subjects of the Empire of China, against the Collector of Customs at the port of San Francisco, to enjoin the defendant from proceeding to destroy a quantity of "Canton," tea, imported by the complainants. The teas had been rejected by the tea examiner as not equal to the standards, there being no standard named for "Canton tea"; on appeal to the Board of General Appraisers the decision of the tea examiner was affirmed and the defendant refused to issue a permit for the entry of the tea for consumption on the sole ground that there was no standard established by law for the tea. The defendant demurred to the bill, and the demurrer was sustained. In the course of his opinion, the District Judge said:

> "The power, then, to prescribe the conditions upon which foreign merchandise may be imported into the United States, is one that resides with Congress, and *the right of importation is therefore not an absolute or vested right under the Constitution, but must be exercised in subordination to the rules which*

may be prescribed by Congress." * * * "The complainants seek to bring this case within the rule of equity jurisdiction, by alleging that the regulations adopted by the Secretary of the Treasury, for the purpose of determining the quality of imported tea, are contrary to the act of Congress, because such regulations omit to establish a standard of quality for Canton tea. I do not deem it necessary to determine whether such regulations, properly construed, prohibit the admission of Canton tea, if it is not inferior in quality to either of the special standards named in such regulations. It is alleged in the bill that such is the effect of the regulations, and that the board of general appraisers based its decision entirely upon such construction of the regulations of the Treasury Department; *but I do not think the complainants have any such absolute or vested right to import tea into the United States as authorize a court of equity to inquire whether the Secretary of the Treasury in establishing standards, under the act of March 2, 1897, or the board of general appraisers in its decision, made any mistake, either of law or fact.* The principle upon which courts of equity act in asserting a jurisdiction to set aside or correct either judicial or executive action is that such jurisdiction is necessary in order to preserve some *vested right* in the complainant which otherwise would be impaired or lost. That principle does not apply here. *Congress might have absolutely prohibited the importation of Canton tea without violating any vested rights of the complainants. Having the right to prohibit, it has plenary power to prescribe the condition upon which such importation may be made;* and as the right to import tea into the United States is made by the act of Congress to depend entirely upon the final judgment of the board of general appraisers that it is equal in quality, purity, and fitness for consumption to the standards established by the Secretary of the Treasury, it would seem to follow that a person desiring to import such merchandise is not entitled to resort to a court of equity for the purpose of setting aside or correcting such final

> determination, upon the alleged ground of mistake made by such special tribunal. The act of Congress contemplates that the decision of the board of general appraisers shall be final, and not subject to revision by the courts. The demurrer will be sustained and the bill dismissed."

This opinion proceeds upon the theory that Congress may absolutely prohibit the importation of tea or may prescribe the conditions upon which importation may be made, and that the action of the Secretary in establishing or failing to establish a standard under the statute cannot be questioned by the courts for mistake of fact or law. The short proposition is this: that the right to trade abroad may be abolished and there may be substituted a privilege to trade dependent on the will of the Secretary of the Treasury.

(2.) The same opinion is expressed more concisely in *Cruikshank* v. *Bidwell* (86 Fed. Rep., 7, S. D. N. Y.). That was a suit to enjoin the enforcement of the act as being unconstitutional, and Judge Lacombe said:

> "The act which plaintiff criticizes in this case is apparently framed, as are the exclusion acts, in conformity with prevailing theories, to leave the decision of disputable questions with an administrative officer rather than with the courts. Such a system is, of course, open to abuse, but it is not necessarily in all cases unconstitutional. *No citizen of the United States has a vested right to import teas if Congress, under its power to regulate commerce, prohibits their importation.* And if that body chooses to admit only those teas which may be approved by such administrative officer as it selects the legislation is similar to that which gives to an administrative officer the power to determine finally whether an alien has or has not sufficient property to be allowed to enter. In view of the decisions of the United States Supreme Court in Lem Moon Sing *v.* U. S., 158 U. S., 538, 15 Sup. Ct., 967, and a line of similar cases, such

legislation seems not to be obnoxious to the objection that it is unconstitutional. Motion denied."

(3.) The Government insists upon this construction of the statute, and it has been approved in the cases at bar.

When the case of *Cruikshank* v. *Bidwell* was before this Court (176 U. S., 73) in the brief filed on behalf of the Government, it was said: "The foregoing instances confirm the proposition that the power of Congress over foreign commerce is such that nobody can be said to have an inherent right to import goods; *that the importation of goods from abroad is by permission of Congress*, and that it is subject to such restrictions as Congress may see fit to impose, and to the supervision of such officials as Congress may see fit to provide for that purpose."

On the trial of each of the cases at bar the same position was taken by the counsel for the Government. In the Bidwell case, objection was taken to evidence as to the character of the teas upon the ground that the standard having been selected by government officials, appointed by Congress for that purpose, is conclusive and cannot be reviewed in any court (Record, Buttfield *v.* Bidwell, fol. 54).

Again, counsel for the Government asked for a direction of a verdict upon the ground "that it is for the Secretary to decide as to the standard which is to be adopted, which decision cannot be reviewed by this Court in this action" (Buttfield *v.* Bidwell, Record, fol. 166).

So where evidence was offered to show that the standard was so fixed as to exclude teas of a high grade entirely pure, wholesome and fit for consumption, counsel for the Government interposed this objection:

"Of course by not putting in objections to this we do not waive the objection that the Secretary of the

Treasury is the proper judge of what tea is of good quality and fitness for consumption" (Stranahan Record, fol. 41).

In the Bidwell case counsel for the Government objected to similar testimony upon the ground "that the Act of 1897 authorizes the board to establish standards which take into consideration not only purity and wholesomeness but also quality, meaning thereby the attributes that are tested by the senses of smell and taste; that the standard, having been selected by Government officials appointed by Congress for that purpose, is conclusive and cannot be reviewed in any Court, and therefore it is entirely immaterial to go into any question of dispute as to whether or not any particular grade of tea, as recognized by the tea trade, was admitted or excluded" (fol. 54).

(4.) The language of the act fixes no other rule of admission than the will of the Secretary upon the recommendation of the board.

The question is, what tea has Congress permitted to be imported? Until the Secretary fixes the standard no teas can be imported (*San Lung* v. *Jackson*, *supra*). If the Secretary has fixed standards, no teas can be imported which are inferior to the standards. Does the law define any rule as to what the standard shall be? Is the discretion of the Secretary limited at any point? He is authorized to fix standards of purity, quality and fitness for consumption; but each of these are terms of comparison.

Purity.—The act contains no provision that impure teas shall not be admitted. The implication is that some degree of impurity in tea may be permitted. Indeed, it cannot be otherwise, since no vegetable product is absolutely pure. The standard may be fixed anywhere as to purity at the will of the Secretary.

Fitness for Consumption.—These words give the Secretary of the Treasury unlimited power to exclude teas according to his idea of fitness for consumption. An article which one man or class of men might regard as entirely fit for consumption might be regarded by another man or class of men as utterly unfit.

Quality.—The quality of an article is its character in the broadest sense. The following are the dictionary definitions of the word:

WEBSTER: "The condition of being of such or such a sort as distinguished from others; nature or character relatively considered, as of goods; character; sort; rank."

WORCESTER: "The nature of a thing relatively considered; property of a thing; attribute."

CENTURY: "Degree of excellence or fineness; grade; as the food was of an inferior quality; the finest quality of clothing."

Mr. Whitney, of counsel for the Government in the brief submitted by him to the Circuit Court of Appeals in *Buttfield* v. *Bidwell*, says: "The term 'quality' is a very familiar one in the English language. It is not synonymous with 'wholesome,' it does not represent hygienic qualities. It represents the attributes of an article in their widest scope. No broader jurisdiction could be given over an article than by giving power to regulate its quality."

The words "purity," "quality" and "fitness for consumption" afford no rule of admission and fix no limit to the power of exclusion.

(5.) It appears from the history of legislation that it was the intention of Congress to confer unlimited power upon the Secretary.

The first act regulating the importation of teas was passed March 2, 1883 (ch. 64). It

prohibited the importation of tea "adulterated with spurious leaf or with exhausted leaves, or which contained so great an admixture of chemicals or other deleterious substances as to make it unfit for use." This was an attempt to establish a definite rule of exclusion. After the tea examiner rejected the teas a re-examination was to be had before a committee of three experts, one to be appointed by the Collector, one by the importer, and the two to choose a third.

In 1890 the food law was enacted (Laws of Congress, 1890, Ch. 339). It provided "that it shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous or malt liquors adulterated or mixed with any poisonous or noxious chemicals, drug or other ingredient, injurious to health."

In commenting upon the effect of this act on the importation of tea in an official report of the United States Agricultural Department in 1892, on food and food adulterations, part 7, page 98, it is said: "With the strict enforcement of the U. S. Adulteration Act (Act of 1890), the consumer is reasonably *well protected so far as securing the genuine leaf is concerned, but of course has no protection from the sale of inferior teas.*"

The Act of 1897 worked a complete revolution in the mode of regulating the importation of teas. It did not prohibit the importation of impure or unwholesome teas, or of teas of any distinctive character. It prohibited the importation of *all* teas except such as were equal to the standards fixed by the Secretary. These were not standards of exclusion, but standards of admission. Unless, therefore, the standards permitted the introduction of particular teas they were excluded. This was a change of the most radical character. It was the substitution of a privilege for a right legally enforceable. If the intention had been to exclude merely unwholesome teas no statute was necessary, for the law, as it then stood, both under the Act of 1883 and the

Act of 1890 excluded such teas. It is obvious that the change in legislation was intended (1) to establish a physical standard of admission in place of a rule of exclusion, and (2) to give the board of experts and the Secretary the authority to fix standards according to their uncontrolled judgment, which should be conclusive.

In a report of the Senate committee, submitted with the bill of 1897, attention was called to the failure of the system of arbitration under the Act of 1883. It was said that "the inspectors found that having no guide as to what constituted tea unfit for use they were obliged to decide according to their own impressions of the moment—necessarily vague—which resulted in the shutting out of a tea to-day which would be admitted to-morrow." Again, "As many teas fit for use may have some quantity of adulterated or exhausted leaf, it is impossible to determine exactly where the line should be drawn" (see copy Senate Report printed in Appendix).

Then, after stating that "the public of the United States are now drinking the lowest average grade of tea ever before known," the remedy proposed is to constitute a committee, to be appointed by the Secretary of the Treasury, "whose duty it shall be to determine the lowest grade of tea fit for use, purchase enough of same for a standard, say five packages of each kind, to enable all importers and inspectors to possess a sample for their guidance." The result aimed at was to establish a physical standard and to compel the importation and sale of a higher grade of teas than was then in use. This was to be done, according to the bill before Congress, by excluding all tea, and by then having the Secretary of the Treasury, upon the recommendation of the board, fix standards of such teas as might be admitted. Under the bill as drawn it was not necessary to provide for the exclusion of any kind of tea, but some provision was required for the admission of teas. The committee was willing to lodge with the Secretary, on the recommendation of the board, the

absolute discretion as to what that requirement should be.

But it may be said that there is an implied requirement that the secretary and the board should exclude only teas of the *minimum* purity and quality which are fit for consumption; that the law did not intend that they should exclude pure tea of good quality. The answer to this is that the statute did not limit the exclusion to the minimum of purity and quality. The manifest intention was to trust the fixing of the standard absolutely to the board and the secretary. The purpose was that the standard itself should be the rule and not be subject to attack as not complying with any other rule. It was not proposed that the action of the board and secretary should be open to inquiry or correction. Just the opposite was the intention. Undoubtedly it was believed that the board and the secretary would act wisely and reasonably. But this belief did not limit or control the absolute discretion which the statute granted.

(6.) An action was brought (*Buttfield* v. *Bidwell*, 96 Fed., 328, C. C. A.) to restrain the Collector Examiner and Tea Board of General Appraisers from excluding his teas upon the "legal theory that within the true meaning of the act of Congress no teas are prohibited from importation which are equal to the standards which had been established in purity, wholesomeness and fitness for consumption and freedom from adulteration or extraneous matter, notwithstanding they are not of the quality in other respects required by the standards." The constitutionality of the law was not raised in that action. It was assumed that the Secretary had the power to establish standards. The plaintiff's contention was that the word "quality" was to be construed as having reference to the purity, wholesomeness and genuineness of the tea and not to its taste and flavor, and that it was, therefore, a word of limited signification, and did not

authorize the exclusion of teas upon the ground of general excellence. In this contention he was unsuccessful. The Judge of the Circuit Court said:

> "By the insertion of the word 'quality' in the statute, Congress intended to cover more than mere purity and unwholesomeness. So interpreted, the statute is in entire harmony with the drift of recent legislation, which, to a continually increasing extent, relegates to governmental determination and control matters which have always hereto fore, in this country, at least, been left to the disposition of the individual citizen, or to the operation of natural laws" (*Buttfield* v. *Bidwell*, 94 Fed. R., 126).

The Circuit Court of Appeals said that the construction of the act claimed by the plaintiff would eliminate the word "quality," and that the history of the legislation showed that the word "quality" was introduced for the purpose of making the act more stringent than the previous Act of 1883, which excluded unwholesome teas, and that this appeared from the report of the Senate Committee, the language of which the Court refers to, pointing out that the standards fixed by the Secretary of the Treasury were to constitute the controlling feature of the new enactment. The Court says:

> "It was amended in the Senate by inserting the word 'quality' between the words 'purity' and 'fitness for consumption' wherever they occurred in the house bill. The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury, which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably or possibly so because of their inferior quality."

The power of the Secretary with regard to the establishment of standards was not before the Court. What the Court was called upon to decide

was whether the examiner in testing the teas could exclude them because, though pure, wholesome and genuine, they were not equal in taste, flavor and excellence to the standards, and the Court held that he might. The opinion does not indicate that the Secretary was required to establish standards of admission upon any rule. He was *authorized* to adopt standards but he was not *required* to adopt them, according to any rule.

In the opinion reference is made to the circumstance that by the Act of 1883 tea "adulterated with spurious and exhausted leaves, or containing such an admixture of deleterious substances as to make it unfit for use was prohibited; and exhausted leaves were defined to include any tea which had been deprived of its proper quality, strength or virtue by steeping, infusion, decoction or other means." But in the case then before the Court it was proved without denial or controversy that the teas there in question were genuine, contained no exhausted leaves and were free from extraneous matter and this was assumed in the opinion and the decision was that the examiner had the right under the statute to exclude teas which though equal to the standards in "purity, wholesomeness and fitness for consumption *and freedom from adulteration and extraneous matter*," did not equal the standard in "quality." "Quality," therefore, was construed to mean something more than a mere exhaustion of the leaf as defined by the Act of 1883.

It is also said in the opinion that the intention was to authorize the Secretary to adopt standards adequate to exclude the lowest grades of tea which were or might possibly be unfit for consumption. The words "lowest grades" are not found in the act, but are taken from the report of the Senate committee, and (see *ante*, p. 26) whatever may have been in the minds of the committee this mental attitude found no expression in the bill as passed. Moreover, the highest grades of some classes of

tea may be unfit for consumption on the basis of quality, while the lowest grades of other classes of tea ought to be admitted on the same basis. The mere grading of the tea does not furnish a rule of exclusion unless it is also provided at what grade the line must be drawn. The Exhibit No. 8 in *Butfield* v. *Stranahan* (p. 19) shows that the finest grades of Fychow and Wenchow teas were excluded.

The opinion referred to states that the amendment of the statute by the introduction of the word "quality" showed an intention to authorize the adoption of standards which would be adequate to exclude the lowest grades of tea "whether demonstrably of inferior purity or unfit for consumption or presumably or possibly so because of their inferior quality." What do the words "presumably or possibly so because of their inferior quality" add to the statutory words "unfit for consumption"? Suppose the Secretary fixes a standard which excludes all country green teas, except the highest grade, and suppose his right to fix that standard could be challenged as not being within the rule prescribed by the statute, and he answered that in his opinion all the other grades are possibly unfit for consumption because of their quality, would not that answer be conclusive? Moreover, standards "*adequate*" to exclude teas unfit for consumption might also exclude other grades unquestionably fit for use, as instanced in the Standard No. 7 referred to in the two cases here on review. The word "adequate" does not fix a rule or place any limit on the powers of the Secretary.

This opinion confirms the conclusion that there is no other rule of admission of teas to be found in the statute than the uncontrolled discretion of the Secretary.

(7.) In the *certiorari* proceeding, above referred to, Mr. Justice Bradley, in an opinion written after the opinion of the Circuit Court of Appeals was announced, construing the act, said:

> "In plain terms, the statute requires the Board of Tea Experts, whose appointment is

provided for, to prepare and submit to the Secretary of the Treasury standard samples of tea, and requires the Secretary of the Treasury upon the recommendation of the Board to fix and establish uniform standards, and to deposit in the custom houses of various ports of the country, duplicate samples of the standards. The standard to be establish is a sample of tea, not a descriptive regulation, and the question whether the tea brought into the country comes up to the standard, must be answered by a test that demonstrates the fact to the senses.

"The duty of the Board of seven members, each of whom must be an expert in teas, is not to hear the importers, or to pass upon the merit of the teas that they severally handle, not to examine witnesses or to take testimony, but, using their expert knowledge, with the aid of their senses, to select samples of tea that in their judgment are of the purity, quality, and fitness for consumption *that justify their use as standards*.

"The duty of the Secretary of the Treasury is to fix and establish standards upon the recommendation of the Board, and to cause duplicate samples of such standards to be placed in the several custom houses. His function appears to be executive.

"The functions of the Board are not judicial.

"The members are selected for their expert knowledge, they act upon their own inspection, and are at liberty to gain such information as they may require for the performance of their duty in any way, and from any available source. The examination of witnesses, or the hearing of parties interested in the subject, or to be affected by the conclusions of the Board, is not contemplated by the statute.

"Under Article 7, section 8, clause 3 of the Constitution of the United States, giving to the Congress power to regulate commerce with foreign nations, the power in that body *to say just what teas, or whether any teas shall be imported into the United States, cannot be questioned. It is part of the political power committed to it.*

"The fixing of standards of tea that may

> be imported would seem to demand specially equipped agents, such as the act in question authorized the Secretary of the Treasury to employ in aid of the duty imposed upon him. The performance of that duty by him, and the performance by the Board of its statutory duties *involved the exercise of a part of the Government power*, and the acts done are not subject to review by the courts."

The fixing of the standard is here declared to be the exercise of governmental power beyond the control of the courts, an absolute power, lodged with the Secretary and the Board.

The constitutionality of the statute was not raised in that proceeding. The application was based upon the statute itself, and proceeded upon the assumption that the law was constitutional.

From this review of the facts attending the enactment of the law and the construction placed upon it by the Courts the conclusion is inevitable that the act excludes all teas from import except such as are equal to standards fixed by the uncontrolled will of the Secretary of the Treasury on the recommendation of the Board.

2. *The power to regulate commerce with foreign nations and between the States is subject to such limitations as are prescribed by the Constitution and its amendments.*

The power to regulate commerce is subject to the limitations imposed by that instrument, and, among others, to those contained in the Fifth Amendment.

This was recognized by Chief Justice Marshall when this Court was first called upon to consider the scope of the commerce clause. He said: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution" (*Gibbons* v. *Ogden*, 9 Wheat., 196). And it has been repeatedly applied whenever proper occasion has arisen.

The power to regulate commerce is not an end in itself. It is an instrumentality which may be employed for many distinct purposes (Cooley *v.* Port Wardens, 12 How., 310, 319, Curtis, *J.*). In scrutinizing its operation attention must, therefore, be given to the purpose for which it is employed, and the restraints which are imposed upon it by constitutional limitations are such as are called into operation by the character of the legislation.

Thus, Congress may, under this power, improve the harbors and navigable rivers of the country, but if in the exercise of that power it deems it necessary to take private property, then it must proceed subject to the limitations imposed by the Fifth Amendment, and can do so only on payment of just compensation.

> *Monongahela Navigation Co.* v. *U. S.*, 148 U. S., 336.

So, when this power was exercised to prevent unjust discrimination in tariff rates by common carriers engaged in interstate commerce, it was held that in the enforcement of the provisions of that law a witness was protected by the constitutional provisions contained in the Fifth Amendment from being compelled to disclose evidence of a criminating character.

> *Councilman* v. *Hitchcock*, 142 U. S., 547.
>
> *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447.

Again, when this power was invoked to protect trade and commerce against unlawful restraints and monopolies (Anti-Trust Law, July 2, 1890), and the right of railroad corporations to enter into a joint traffic agreement was brought before this Court under that law, this Court, speaking through Mr. Justice Peckham, in *U. S.* v. *Joint Traffic Association* (171 U. S., 503, 505), said:

> "The power to regulate commerce has no limitations other than those prescribed in the

> Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the Constitution or any of the Amendments to that instrument (citing the cases above cited).
>
> "Among these limitations and guaranties counsel referred to those which provide that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation, we think, is plainly irrelevant. As to the former, it is claimed that the citizen is deprived of his liberty without due process of law when by a general statute he is arbitrarily deprived of the right to make a contract of the nature herein involved."
>
> See briefs of R. W. De Forest and David Willcox and Mr. E. J. Phelps, filed in that case.

Again, when, in the interest of public morals, Congress undertook to regulate commerce by prohibiting the transmission of lottery tickets from one State to another by express or otherwise (Act of March 2, 1895), this Court having reached the conclusion that lottery tickets were articles of commerce, sustained the validity of the law and met the objection that its decision might justify an interference of the plenary power of Congress to prohibit or regulate interstate commerce beyond constitutional restrictions in these words:

> "It is said, however, that the principle that in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when

> we must do so. The present case does not require the Court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat in this connection what the Court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument."
>
> Lottery Case, 188 U. S., 321, 362.

Indeed, any pretence that the power to regulate commerce in whatever direction and to whatever purpose applied is not subject to the restriction of the Fifth Amendment is dissipated by a reference to familiar history. The first ten amendments had their origin in the danger which was apprehended that the powers that might be exercised under the Federal Constitution were not subject to the checks and limitations for the protection of liberty and property which had been insisted upon and vigorously proclaimed in the bills of rights and constitutions of the several States They were passed as the preamble recites because a number of the States at the time they adopted the constitution "expressed a desire in order to prevent misconstruction and abuse of its powers that further declaratory and restrictive clauses should be added." Hence the prompt adoption of these amendments:

> "The rights preserved by the Fifth Amendment were deemed so vital to the safety and security of the people that the absence from the constitution adopted by the convention of 1787 of express guaranties of them came very near defeating the acceptance of that instrument by the requisite number of States. The constitution was ratified in the belief and only because of the belief, encouraged by its leading advocates, that immediately upon the organization of the government of the Union, Articles of Amendment would be submitted

> to the people recognizing these essential rights of life, liberty and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country."
>
> Harlan, *J.*, in *O'Neil* v. *Vermont*, 144 U. S., 323, 371.

Can it be doubted that a regulation of commerce which should deny to certain citizens the equal protection of the laws would be unconstitutional because inconsistent with these principles of equality and liberty which are involved in and form the essence of the Fifth Amendment, although that amendment does not contain, as does the Fourteenth, a specific prohibition upon legislation which denies to any person the equal protection of the laws? But if this be so, how can it be successfully claimed that the power to regulate commerce with foreign nations is not subject to every guaranty, expressed or implied, embodied in the Fifth Amendment?

3. *When the power to regulate commerce is employed for purposes of police regulation it is subject to the restraints of the Fifth Amendment.*

(i.) Since "the power to regulate commerce embraces a vast field containing not only many but exceedingly various subjects quite unlike in their nature" (Cooley *v.* Wardens, *supra*) each subject must have its appropriate constitutional limitations. When political, international and other interests which it is not now necessary to attempt to classify are involved, the encroachments upon individual liberty and property may, be extraordinary and far reaching. In such instances it may be that even a temporary prohibition of all foreign commerce is consistent with the natural liberty of trade secured by the Fifth Amendment. It was so held when Congress, in view of the danger to our commerce and threatened hostilities, passed the Embargo Laws (Embargo Act of 1807).

The question was presented in *U. S.* v. *The William*, 2 Hall L. J., 255; 28 Fed. Cas., 614. The Judge who wrote the opinion in that case (Mr. Justice Davis, District Court of Mass.), reached the conclusion that the act was not in contravention of other constitutional provisions in view of the necessities for such legislation, upon which Congress was called upon to act, and in view of the conclusion that from the very nature of their provisions the acts could not be destined to be perpetual, but were intended to meet a temporary emergency (see Von Holst's Constitutional Hist., Vol. 1, pp. 204, 211, and note citing extract from letter of Judge Story).

See Story on Const. Law.

We are not, however, now concerned with legislation which relates to international and political matters, or to extreme cases. This act purports to deal with health and the welfare of society in the ordinary conduct of life. It is in the nature of a police regulation. It is entitled "An Act to Prevent the Importation of Impure and Unwholesome Tea." The report of the Senate Committee shows that the purpose of the legislation was to regulate the sale and consumption of teas. In *Sang Lung* v. *Jackson*, Mr. Justice DeHaven said it was enacted to prevent the introduction into the United States of impure and adulterated tea.

It is analogous to an inspection law, since it has been decided that such laws may be made applicable to articles of import as well as to those of export (*Potapsco Guano Co.* v. *North Carolina*, 171 U. S., 345), although no provision is made for identification of grade or character of goods by marks and numbers. Such laws are properly classified as exercises of the police power (*Cooley Cons. Lim.*, 6th Ed., pp. 720, 721).

The statute in question being in its nature a police regulation, although the power to enact it grew out of and was incidental to the power to regulate commerce, it is subject to the restraints of the Fifth

Amendment to the same extent that similar State legislation is to the Fourteenth Amendment.

It is not necessary to argue that the rights of liberty and property secured by the Fifth Amendment to citizens of the United States are no less than those which are secured to the citizens of the several States by the Fourteenth Amendment; nor that they are not less binding upon congressional legislation than the Fourteenth Amendment is upon State legislation.

(2.) Reference to the history of the decisions of this Court relating to the exclusiveness of the power of Congress under the commerce clause, is not without interest in its bearing upon this point. The question whether the power to regulate commerce was exclusively with Congress, or whether the several States, in the absence of Congressional legislation, might enact police laws which, in effect, regulated commerce, was brought before this Court during its early history (Wilson *v.* The Blackbird Creek Marsh Co., 2 Peters, 245; New York *v.* Miln, 11 Peters, 182; the License Cases, 5 How., 504), and it was apparent that if the commerce clause was held to be operative to exclude all State legislation affecting commerce, much of the police power reserved to the States would be held in suspense as not being within the sphere of State action, and as not having been acted upon by Congress (see opinions of Woodbury, *J.*, in the License Cases, *supra*, and in the Passenger Cases, 7 How., 559). Without attempting to refer to the numerous authorities in which this subject has been considered, it may, we think, be confidently asserted as the final outcome that the several States may, in the absence of national legislation, pass police laws upon many subjects which do, in effect, regulate commerce (Southern Steamship Co. *v.* The Port Wardens, 6 Wall., 33; Bowman *v.* Chicago, &c., Ry., 125 U. S., 489; N. Y., N. H. & H. R. Co. *v.* State of New York, 165 U. S., 631; Reid *v.* Colorado, 187 U. S., 137).

No one, we think, can doubt that in the absence of a Federal statute prohibiting the importation of unwholesome tea the State of New York might pass an act prohibiting such importation as a police regulation. But under the guise of such an enactment could it destroy the fundamental right to trade in wholesome teas and substitute in its place a mere privilege dependent upon the will of an individual?

When Congress entered upon the same domain and excluding State legislation undertook to pass this law, while of course it was not bound by the provisions of the New York Constitution, or by the decisions of its Courts, was it not restrained by the fundamental guaranties of liberty and property which are common to Federal as well as to State legislation? If not, we have the anomaly of essential constitutional rights secured to the citizens of the States so long as powers affecting commerce by police enactments remain with them, abrogated when Congress exercises the same power under the Federal Constitution, although that instrument was ordained to secure more effectually "the blessings of liberty." In short, a power exercised to-day within defined limits by the States under the protection of civil liberty may to-morrow be exercised by Congress within the same limits free from those protections. This is a conclusion which we think this Court will be slow to adopt.

(3.) This argument does not ignore the comprehensive character of the grant of power to "regulate commerce with foreign nations" as shown in the historical derivation of that clause. It may be conceded that this was one of the powers of sovereignty deemed to be exclusively within the control of Great Britian during the Colonial period, and it cannot be doubted that British regulations of our foreign commerce were restrictive and sometimes prohibitory.

It was among the injuries and usurpations on the part of the King of Great Britain enumerated in the Declaration of Independence that he had combined to

subject the colonists to a jurisdiction foreign to our Constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation cutting off our trade with all parts of the world.

The Articles of Confederation gave the United States, in Congress assembled, the sole and exclusive power of regulating the trade and managing all affairs with the Indians not members of any of the States, and also the exclusive right of entering into treaties and alliances "provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any specie of goods or commodities whatsoever" (Art. 9).

From these and other circumstances it may be urged that when the power to regulate commerce with foreign nations was by the Constitution conferred by the people of the United States upon Congress, Congress acquired a dominion over foreign commerce similar to that which had theretofore been exercised by the King and Parliament of Great Britain, or preserved to the several States, and as a conclusion from this proposition, it may be urged that whenever Congress attempts to regulate foreign commerce it has absolute and autocratic powers, unrestrained by the constitutional guaranties for the protection of liberty and property.

But the conclusion does not follow from the premise. Because certain powers more or less absolute may be exercised by Congress over foreign commerce, it does not follow that every exercise of power over foreign commerce is, therefore, absolute and arbitrary. The grant of power, though general and plenary, must in its application be limited by the purpose and end to be attained.

The primary object of the grant to Congress of the power to regulate commerce with foreign nations was to vest in the common government of all,

the power, by uniform regulations, to counteract the powers of foreign countries hostile alike to all. Doubtless the first thought was protection by combination against foreign intrigue or attack upon the commerce of the States, and for this purpose the States were willing to concede political powers akin to those which had been customarily exercised by independent and sovereign nations. But when this clause was introduced into the Constitution, establishing complex relations between the several States and the Federal Government, with enumerated powers restrained by express guaranties of personal liberty and property, it was not compatible with such a system that arbitrary powers conferred to meet foreign relations should be used in the government of the people as between themselves in their domestic relations.

But the power to regulate commerce, as we have already said, covers a vast field containing various subjects unlike in their nature. "It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish and to descend to the most minute directions, if it shall be deemed advisable, and that to whatever extent ground shall be covered by these directions, the exercise of State power is excluded." (Cooley's Cons. Lim., 4th ed., p. 732; *Gloucester Ferry Co.* v. *Penn.*, 114 U. S., 196, 215).

It is a matter of common observation that legislation based upon the commerce clause has within comparatively recent times extended over a great diversity of subjects affecting internal as well as external interests. Observe the case now before the Court. Tea is an exotic; the domestic trade in it depends upon importation. This act, therefore, affects trade in every part of every State and Territory. It does this, not for the protection, maintenance or welfare of the National government, or for the public safety, but avowedly for the protection of the health and welfare of the individual. It touches

his comfort and welfare in his private relations. Similar legislation may in like manner affect trade in every commodity of foreign production. If we are to apply the absolute and arbitrary powers which it may be assumed are for some purposes committed to Congress in the regulation of foreign commerce to this wide field of industry and happiness, then those relations of government which come closest and nearest the individual have been by our form of government left outside of the protection of constitutional guaranties of liberty. Such a conclusion is as repulsive as it is unnecessary. A just discrimination as to the subjects of regulation indicates that certain of the powers which may be exercised over foreign commerce are inherently of such a character as to be exclusively political and not reviewable by the courts; but arbitrary powers, though sometimes indispensable, can never, under our system of government, be the rule, they must be the exception, and when Congress, for the purpose of protecting the health and welfare of the citizen, enacts a law relating to trade in tea, there cannot be in the exercise of this function of government anything which calls for or justifies arbitrary or despotic action in disregard of the ordinary rights of person and property.

Unless this be so it is impossible to resist the force of the contention that general police power being exclusively within the control of the States, Congress cannot exercise such general police powers under the power to regulate commerce.

Lottery Cases, 188 U. S., 364, dissenting opinions.

License Cases, 5 How., 594, 599.

(4.) This doctrine may be somewhat more easily accepted when it is applied to interstate commerce, but the principle is the same. Is it within the competency of Congress to prohibit trade between the States in a wholesome article of commerce, or to place such interstate commerce in the arbitrary control of

an individual or of a board? No Court, no publicist has maintained that it could (See address of J. Randolph Tucker on the Regulation of Interstate Commerce, 4 Ry. & Corp. L. J., 290). Why not? The natural rights of the citizen to trade are the same in each instance. It is only because the powers granted to Congress in the case of foreign commerce include control over subjects which are not embraced in interstate commerce. All the powers of Congress are trust powers, to be used for and not against the liberties of the people. However extensive and arbitrary the powers may be which the people have given to the central government to be used against foreign peoples, it cannot be successfully contended that they intended to give the same extensive and arbitrary powers to Congress to be used against themselves.

In the Joint Traffic Association case the contract in question was assailed as being in restraint not only of domestic but of foreign trade. Suppose that the argument had prevailed that Congress had no power to prohibit the enforcement of the contract because it interfered with rights under the Fifth Amendment, would this Court have held the contract for that reason void as to interstate commerce, but valid as to foreign commerce, because the regulation of foreign commerce may be arbitrary, or if we may imagine a case resembling the Lottery case, where, however, Congress had prohibited the importation from abroad and also the transhipment between the States of a wholesome article of commerce, and this Court had held that that was a violation of personal rights under the Fifth Amendment, would it be reasonable to hold that the law was invalid as to interstate transportation but valid as to foreign import, and if so, upon what substantial ground that would appeal to the good sense of mankind could such a ruling be made?

(5.) But however extensive the powers of Congress may be over commerce with foreign nations, the laws which it makes for carrying into execution

these powers must be "necessary and proper" (Constitution, Art. 1, Sec. 8, Par. 18). Grant that it may prohibit the importation of all tea. The intention of this act was not to prohibit the importation of all tea, but to restrict the importation, and in carrying into effect this power of restriction Congress must use means which are constitutional. It cannot subordinate the right of the citizens to the will of one man, because that is to substitute slavery for freedom, and to violate not only the letter but the spirit of the Constitution from the first word to the last, and such legislation cannot be "proper."

In the often quoted language of Chief Justice Marshall, in McCulloch *vs.* Maryland, 4 Wheaton, 421, holding that this clause is not a limitation upon the powers of Congress, but an expression of necessarily implied power, "Let the end be legitimate, let it be within the scope of the Constitution, all means which are appropriate, which are plainly adapted to that end, which are not prohibited, *but consistent with the letter and spirit of the Constitution are constitutional.*" The word "proper" is here used with regard to the relation between the sovereign and the people, fixed by the Constitution itself. The word means, says Judge Story, "*bona fide* appropriate to the end;" or in the words of Chief Justice Marshall, "appropriate plainly adapted" to a constitutional and legitimate end and "not prohibited but consistent with the letter and spirit of the Constitntion" (Chief Justice Chase, Legal Tender Cases, 12 Wall., 573).

Why, we ask, should Congress have the power to disregard for police purposes personal rights of liberty and property which the States may not disregard for the same purposes? What wise or beneficent end is to be attained by establishing such a distinction? Will it conserve the interests of the nation or its citizens that Congress shall have arbitrary powers when, under the guise of regulating commerce, it enacts a police regulation, while such

powers are denied to the States with whom the direct exercise of the police power is lodged?

(6.) It is not necessary to attempt a definition of the police power. Concededly, regulations which have to do with public health and with the protection of society against imposition and fraud are embraced in that term. In whatever direction it is exercised, the police power may interfere with the unrestricted enjoyment of liberty and property. In return for the benefits of organized society the citizen consents to these restrictions, but it is evident they must have a limit. The complete surrender of liberty and property for the safeguarding of liberty and property would be a solecism. The point at which the demands of government under the police power are restrained by the paramount constitutional guaranties of liberty and property cannot be fixed, but must be left to be determined by the process of exclusion, as applied to particular cases.

Under our form of government the question whether that limit has been overreached in a particular instance must always be a judicial question. This proposition, although now supported by the weight of authority, has not at all times met with approval. In *Powell* v. *Penn.*, 127 U. S., 678, Mr. Justice Harlan said:

> "If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing oleomargarine as an article of food their appeal must be to the Legislature, or to the ballot box, not to the judiciary."

This expression was guarded by the language used by the same Judge in the subsequent paragraphs of the opinion. Unless it is so qualified it will be difficult to reconcile it with principle or with the later decisions of the Court. If an act is unnecessarily oppressive is not that a deprivation of liberty? Can there be a better definition of

the deprivation of liberty than unnecessary oppression, and if when by legislative enactment a citizen is deprived of liberty his only redress is by appeal to the Legislature or to the ballot box, what becomes of constitutional protections? Is not the Legislature thereby constituted the paramount authority, and may we not ask, with Chief Justice Marshall, "To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?" (*Marbury* v. *Madison*, 1 Cranch, 137, 176).

That the words of Mr. Justice Harlan quoted above were not intended to deny the power of the judiciary to declare police regulations unconstitutional, because unnecessarily oppressive and violative of civil liberty, appears from his language in the same opinion:

> "Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the State Legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty or property, or other rights, secured by the supreme law of the land."

The same idea is expressed even more emphatically by the same learned Justice in *Smyth* v. *Ames*, 169 U. S., 468:

> "The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This protection and duty of the judiciary dis-

> tinguishes the American system from all other systems of government. The perpetuity of institutions and the liberty which is enjoyed under them depend in no small degree upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

Speaking of the power of the courts to pass upon the constitutionality of police legislation, Mr. Justice Brown, in *Lawton* v. *Steele*, 152 U. S., 133, said:

> "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

It was justly said in the case of *Holden* v. *Hardy*, 169 U. S., 366, that the police power cannot be put forward as an excuse for oppressive and unjust legislation.

So, in *Cotting* v. *Goddard*, 183 U. S., 83, 86, where the Kansas stockyard law was declared unconstitutional, the opinion of the Court, announced by Mr. Justice Brewer, based the illegality of the legislation not merely upon the ground that the Stockyard Company was denied the equal protection of the law, but also upon the ground that the statute by its necessary operation deprived the company of its property without due process of law. While the majority of the Court did not concur in the latter conclusion, yet it did in the former.

Finally, the doctrine was announced with *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 558, that "as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes to the contrary notwithstanding, a statute of a State even when avowedly enacted in the exercise of its police power must yield to that law" (Harlan, *J.*).

This opinion is confirmed by the latest and best considered opinions of the State courts.

Noel v. *The People*, 187 Ill., 587;
Ritchie v. *The People*, 155 Ill., 98;
Ruhstrat v. *The People*, 185 Ill., 133;
Gillespie v. *The People*, 188 Ill., 176;
Bessette v. *The People*, 193 Ill., 334;
State v. *Chicago, M. & St. P. R. Co.*, 68 Minn., 381;
In re Jacobs, 98 N. Y., 98;
People v. *Marx*, 99 N. Y., 377;
People v. *Gilson*, 109 N. Y., 389;
Waters v. *Wolff*, 162 Pa.;
Am & Eng. Enc. of Law, 2nd ed., Vol. 22, p. 937.

Some enlightment upon this subject may be found from the history of the tariff rate litigation in this Court.

In *Munn* v. *Ill.*, 94 U. S., 113, Mr. Chief Justice Waite remarked of the power of the State legislature to regulate rates for warehousing: "We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses of legislature the people must resort to the polls, not to the Court"; but after the experience of the "Granger" legislation, this Court, through the same learned Judge, in the Railroad Commission cases (116 U. S., 307 [331]) declared that the power to regulate was not a power to destroy and "limitation is not the equivalent of confiscation," and still later this Court reached the conclusion upon that subject for which we are contending here that "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States as

depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

Covington, &c., Turn Pike Co. v. *Sandford*, 164 U. S., 578.

4. *The Act violates the Fifth Amendment, because it permanently deprives the plaintiff and other citizens of their right to trade in a beneficial and wholesome article, except at the uncontrolled will of the Secretary of the Treasury and a board appointed by him.*

(1.) The right to trade is a natural right, which is protected by the Fifth Amendment. In the opinion from which we have quoted above (*Sang Lung* v. *Jackson*, *supra*, p. 19; *Cruikshank* v. *Bidwell*, *supra*, p. 21), it is said that no citizen of the United States has a *vested* right to import tea. The phrase is we think inappropriate. The nat ural right to trade lies back of rights vested by law or contract. It exists because it is God-given. Just governments are established to preserve not to create it. There never can be any justification for an enactment which permanently prohibits a useful industry. Such an enactment is not within the domain of law; it is a mere act of despotism.

In the leading case of Mitchell *v.* Reynolds (1 P. Williams, 181, 188) it is said that the language of Magna Charter, "'Nullus liber homo, &c., desscisitur de libero tenessiento vel libertatibus vel liberis consue ludembus, suis, &c.,' extend to freedom of trade."

But if it be self-evident that the Legislature, whether State or Federal, may not permanently deny to a citizen the right to employ his energies in a useful trade it is still more apparent that it may not by such absolute prohibition and its arbitrary relaxation place the right so to trade within the uncontrolled will of an individual or

board. This arises from the nature of free government.

In the eloquent language of Mr. Justice Mathews in *Yick Wo* v. *Hopkins*, 118 U. S., 356:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'May be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In that case the right to carry on the laundry business was made dependent upon the consent of the

Board of Supervisors, unless the laundry was located in a building constructed of either brick or stone. Any one could conduct a laundry in a brick building, but only those to whom the board might choose to give consent could carry on the same business in a wooden building. The discretion to grant that consent was arbitrary and unregulated. It differed as the case at bar differs from the ordinary regulations of various industries by license or permit in that there were no requirements with which, if one complied he was lawfully entitled to the consent of the Board of Supervisors (*Gundling* v. *Chicago*, 177 U. S., 183, 187).

In commenting upon this case in *Crowley* v. *Christensen* (137 U. S., 86), Mr. Justice Field said "The ordinance therein held invalid vested an uncontrolled discretion with reference to a business harmless in itself and useful to the community." For this reason it was held unconstitutional as in violation of the Fourteenth Amendment.

The Yick Wo case was not so severe as the case at bar. A Chinaman might build a brick house and would thereby become entitled to conduct a laundry, but no American citizen can upon any terms acquire the right to import wholesome teas, even as a curiosity, without the consent of the Secretary of the Treasury. Nor is the force of that decision weakened by the circumstances that a municipal ordinance was then under consideration, while here we have to do with a congressional statute. The ordinance was stricken down by this Court because it was repugnant to the Fourteenth Amendment and not because it was unreasonable or unwarranted in the exercise of the powers of the Municipal Assembly. It was weighed here in the same balance in which we are asking the Court to weigh this enactment. Whether the offending measure be a municipal ordinance or an enactment of the National Legislature it must yield to the supremacy of the Constitution.

In Noel *v.* The People (187 Ill., 587) an act to reg-

ulate the practice of pharmacy in the State of Illinois was under review. Among other things, it provided that the Board of Pharmacy might, in their discretion, issue permits to persons, firms or corporations engaged in business in villages or other localities empowering them to sell the usual domestic remedies and proprietary medicines under such restriction as the Board of Pharmacy might deem proper. The Supreme Court held the act unconstitutional among other things for the reason that the discretion conferred was uncontrolled and arbitrary. The Court said:

> "The board is thus authorized to confer a privilege upon one person, firm or corporation and deny the same privilege to any other person, firm or corporation, and is not required to be governed in doing so by any fixed rules or regulations, but may be moved thereto only by its own caprice or favoritism. Laws thus conferring discretionary and arbitrary powers upon statutory officials are not only invalid for the reason already stated, but amount in effect to a delegation by the Legislature of its legislative functions to the board or officials in question."

A forcible illustration of the application of this principle is found in the case of the *People* v. *Warden*, 157 N. Y., 116. A statute of the State of New York prohibited any person from selling a passage ticket on any vessel or railway train unless authorized by the agents of the owners or consignees of the vessel or by the company, with other restrictions. This act was held unconstitutional as prohibiting a business which was neither dangerous nor injurious to the public, except upon the arbitrary consent of the individuals designated by the statute.

Another illustration is found in the case of *Sioux Falls* v. *Kirby*, 25 L. R. A., 621. In that case an ordinance in effect prohibited any person from erecting a building of any description upon his land, ex-

cept upon obtaining a permit from an inspector that the building complied with the requirements of the law, but the ordinance did not provide what the requirements were. The ordinance was held unconstitutional upon the principal announced in *Yick Wo* v. *Hopkins*.

To the same effect is the language of the Court in *Live Stock Dealers* vs. *The Crescent City Live Stock, &c.* 1 Abb. U. S., 399; Fed. Cas., No. 8408;

> "No proposition is more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful and industrial pursuits, not injurious to the community, as he may see fit, without unreasonable regulation or molestation. There is no more sacred right to citizenship than the right to pursue any lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

This principle is nowhere more forcibly stated than by Mr. Justice Rapallo in *People* v. *Marx*, 99 N. Y., 377:

> "Among these (constitutional safeguards) no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit (Live Stock Ass'n *v.* The Crescent City, &c., 1 Abb., 398; Slaughter House Cases, 16 Wall., 106; Corfield *v.* Coryell, 4 Wash., 380; Matter of Jacobs, 98 N. Y., 98; 50 Am. Rep., 636). The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, *J.*, in Bertholf *v.* O'Reilly, 74 N. Y., 515; 30 Am. Rep., 323, the right to liberty embraces

> the right of man 'to exercise his faculties and to follow a lawful avocation for the support of life,' and as expressed by Earl, *J. In re* Jacobs, 98 N. Y., 98, 'one may be deprived of his liberty, and his constitutional rights thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.' "

Without multiplying citations, we think it cannot be successfully contended that the right of a citizen to carry on a lawful business can be placed under the arbitrary and uncontrolled will of an individual or board.

Cicero Lumber Co. v. *Cicero*, 176 Ill., 9; 42 L. R. A., 696.
Harmon v. *Ohio*, 66 Ohio St., 249; 58 L. R. A., 618.
Noel v. *The People*, 187 Ill., 587.
Colon v. *Lisk*, 153 N. Y., 188, 197.
In re Grice, 79 Fed., 627.
State v. *Ashbrook*, 154 Mo., 375.
N. Y. S. U. Co. v. *Dept. of Health*, 61 App. Div., 106.

(2.) This position is not inconsistent with anything decided by this Court under the Alien Exclusion laws (*Lem Moon Sing* v *U. S.*, 158 U. S., 538; *Chae Chan Ping* v. *U. S.*, 130 U. S., 581; *Nishimura Ekiu* v. *U. S.*, 142 U. S., 651; *Fong Yue Ting* v. *U. S.*, 149 U. S., 698; *Wong Wing* v. *U. S.*, 163 U. S. 228; *U. S.* v. *Wong Kim Ark*, 169 U. S., 649), or with the legislation making the decision of immigration or custom officers against the right of aliens to enter the country final (*Lem Moon Sing* v. *U. S.*, 158 U. S., 538).

The Alien Exclusion Acts do not rest upon the

power of Congress to regulate commerce, but upon the sovereign power to exclude all aliens from national territory, which is incident to every independent nation. Similar laws applicable to citizens would be unconstitutional (*U. S.* v. *Wong Kim Ark*, 169 U. S., 649).

(3.) Nor is this position inconsistent with the cases which sustain police restrictions and prohibitions upon immoral, harmful and dangerous pursuits, or with the proper regulation of professions, trades and industries, although innocent and beneficial.

We concede the right to prohibit or restrain pursuits which are harmful or which have an immoral tendency. Cases relating to the prohibition or restriction of the sale of liquors and poisonous drugs and other deleterious substances are of this class. Innocent and beneficial pursuits may also be regulated under the police power, and it has been urged that the means of regulating certain professions and trades sanctioned by the courts are often not essentially different from those employed under this statute. If a board may be authorized to fix, by an examination paper or otherwise, a standard of qualification which one must reach before he can work as a plumber, then it is asked why may not an individual or board be empowered to fix a standard of purity, quality and fitness for consumption of teas to be imported? There is an apparent but no real resemblance between the two cases. Requisite fitness and skill are a part of the necessary equipment for the practice of certain pursuits. This is not made so by law; it is a part of the existing order of things which the law recognizes.

At common law a man is held to warrant impliedly that he is competent to perform the service which he holds himself out as competent to perform, and if one employing him suffers damages by reason of his want of skill, he is liable therefor. The statutory provisions are intended to safeguard the

community against the want of skill which is actionable when resulting in damages.

The rules adopted by any board for the admission of persons to such pursuits must be adapted to and be suitable for the determination of such fitness and skill. Requirements which have no such relation to such calling or profession, or which are unattainable by reasonable study and application, or which are arbitrary, deprive one of his right to pursue a lawful avocation, and statutes permitting such requirements are invalid.

Dent v. *State of W. Va.*, 129 U. S., 114.
Harmon v. *Ohio*, 58 L. R. A., 618; 66 Ohio St., 249.
Noel v. *The People*, 187 Ill., 587.
Gundling v. *Chicago*, 177 U. S., 183.
Minn v. *Fleischer*, 41 Minn., 69.
City of Monmouth v. *Popel*, 183 Ill., 634.
Cumming v. *Missouri*, 4 Wall., 377.
Ex parte Garland, 4 Walll, 333.

This being the character of such legislation, compare it with the act in question. What are the qualifications for the admission of tea furnished by the act which are to be determined by the Secretary of the Treasury on the recommendation of the tea board?

Is there any "quality" of tea which one can say is so universally recognized as an indispensible feature of tea, that the use of the word "quality" indicates the precise and definite thing intended to be established as a standard?

If not, when the Secretary is authorized to fix a standard of quality, is there any guide in the natural order of things or in the statute to control his action? Since it is manifest that there is not, the exercise of the power under the statute is arbitrary and not measured by any rule.

As well might the Legislature authorize a board to determine the quality of wines, of perfumes, of colors, of all and every attribute of an article of trade which depends upon taste and fancy, and on the basis of such determination restrict or prohibit trade.

Moreover the action of such boards as are referred to is open to review by the courts and if the requirements are unreasonable or the proceedings unjust or unfair, they may be corrected (*Dent* v. *West Virginia*, 129 U. S., 114, 125; *Rietz* v. *Michigan*, 188 N. Y., 505). But the proceedings of the Secretary in fixing the standings are not reviewable by *certiorari* (*People* v. *Gage*, MSS. see appendix), nor by bill in equity (*Sang Land* v. *Jackson*, *supra*; *Buttfield* v. *Bidwell*, *supra*), nor otherwise. If this act is constitutional and the Secretary should fix standards which should admit annually only 100,000 pounds of tea in the place of the 90,000,000 pounds of pure, wholesome and genuine tea now imported, his action could not be reached by judicial proceedings. This was one of the circumstances animadverted upon in *Wick Wo* v. *Hopkins* as showing that the powers conferred were arbitrary.

Moreover, as we have said, the requirements regulating the practice of a profession, trade or industry must be such as to be within the attainment of all; opportunity must be equal. If one devotes enough ability, time and industry the requirement must be within his reach. This is universally true, except where the pursuit is immoral or has an immoral or dangerous tendency. But no one by any skill in horticulture or in manipulation can produce teas which will meet the requirements which the Secretary of the Treasury may make as to the quality of tea. It is like measuring space by the distance between the clouds.

(5.) The statute in practical operation, as shown by the records in two of the cases before the Court,

demonstrates its arbitrary character. The evidence shows that the standard for Country Green teas for the year 1901, if it had been uniformly applied, as required by law, would have excluded 70 per cent. of the entire crop, the average quality of these teas being higher than that of other kinds of tea imported into this country (Record, Buttfield *v.* Stranahan, fols. 71, 36). It would have cut down the importation of Country Green teas from between 5,000,000 and 6,000,000 pounds to less than 2,000,000. If the same standard of fineness of quality had been extended through the entire importation of teas it would have excluded 75 to 80 per cent. of all teas that are usually imported into this country (same Record, fol. 71), reducing the importation from 90,000,000 bounds to 10,000,000 or 15,000,000.

The standard was placed at the fifth grade of Country Green teas (Buttfield *v.* Stranahan, Exhibit 8, p. 19), there being in all seventeen grades of quality. There is no reason why the Secretary should have placed the standard where he did rather than at any other grade. Indeed, there is nothing in the law which would give redress if the Secretary had made no standard at all. In the preceeding and following years (1900 and 1902) the standard for Country Green teas was very much lower (fols. 114, 115, Buttfield *v.* Bidwell). The standard established in 1901 for teas other than Country Greens was much lower in quality (Bidwell, fol. 119). The chairman of the Board of Tea Experts attempts to explain the high standard of Country Green teas (No. 7) for the year 1901 by saying that when the standard was selected there were no teas in the market appropriate for a standard that were inferior in cup quality to the teas which were selected as the standard, though such teas are produced (fol. 62, Record, Buttfield *v.* Stranahan). This is an admission that the standard was arbitrarily fixed upon a mere matter of convenience. The arbitrary character of the Secretary's action in fixing

the standard appears from the provision of Regulation XX. "As an illustration, a Teenkai may be equal to a Moyune, but a distinctly smoky or rank Fychow, or Wenchow of sour character, must not be considered as equal to the two first mentioned" (Buttfield *v.* Bidwell, Record, p. 26). That regulation, on its face, contemplated that there were Wenchow and Fychow teas which might come in, but by the standard established in 1901, all Fychow and Wenchow teas were excluded, whatever their quality, purity or fitness for consumption (fol. 118), notwithstanding the uncontradicted fact that there are a great many such teas which are ordinary subjects of commerce and which are wholesome and suitable for consumption (fol. 118). More than that, the Court has before it the opinion in the *certiorari proceedings*, where an attempt was made to revise the action of the Secretary in fixing this standard, and although months had then elapsed and abundant opportunity had been afforded to obtain samples of Country Green teas which were appropriate as samples, no effort was made to do so. Why not? May it not be fairly inferred that the government was determined to demonstrate to this plaintiff and others in sympathy with him that it had the arbitrary power to fix the standard where it pleased, and that neither he nor any other citizen could question that power? This is the position it has uniformly taken. It is this assumption of absolute and arbitrary power by the Secretary of the Treasury to exclude, upon advice of a board of those interested in the tea trade, if he will, any and every grade and character of tea, which is challenged by the plaintiff in this case.

(4.) The powers conferred by this act are arbitrary because they authorize the Secretary to fix a physical standard which from its nature is variable, and which cannot be applied with reasonable certainty. This statute attempts to make a physical thing itself a rule of law. No similar enactment

can be found upon the statute books. This standard being a vegetable product, must necessarily vary from day to day. Being a standard of quality, determined by the sense of taste and smell, it is impossible to test the truthfulness or accuracy of its application.

In the report of the Senate Committee it is said that "it is a well known fact that experts vary in their impressions of value as proven continually by valuations of public auctions in which the teas are never valued the same by different brokers, but frequently at twenty or thirty per cent. variation." It is a matter of ordinary experience that our faculties of taste and smell vary greatly on different occasions.

Moreover, the report of these two faculties is purely subjective. It is impossible to test the accuracy of the senses as reported by the examiner or the truthfulness of his report by any rule.

The instances in which legislation prohibiting trade in articles of food, unless conforming to a standard prescribed by the law, as in the milk cases requiring a certain proportion of oleaginous matter, stand on a different footing. It is possible to apply a test outside of the mental operation of the examiner in all such cases, but not in this case.

There is no similarity here to standards of weight or measures or to coins, because each of these have mathematical properties which are capable of precise application.

5. *Apart from the arbitrary power lodged with the Secretary, the act is unconstitutional because it prevents the plaintiff and others from dealing in a wholesome and ordinary article of commerce, and destroys a trade in which he and others had been engaged.*

(1.) While laws prohibitory of the manufacturing and sale of liquor as an article dangerous to public safety and public morals have been sustained as

within the police power of a State, in *Austin* v. *Tennessee* (179 U. S., 343, 347), Mr. Justice Brown said, "How far such laws could be made applicable to articles admitted to be innocuous has never been decided by this Court." It was distinctly left open in the lottery case, as far as the question was there presented (Lottery case, 188 U. S., 321, 362). But there is abundant authority upon this subject in the opinions of State Courts of last resort. The leading authority is *The Matter of Jacobs*, 98 N. Y., 98. In that case the manufacture of cigars or the preparation of tobacco in any form on any floor or in any part of a floor in any tenement house was prohibited, if such portion of the house was occupied as a residence, and the carrying on of this industry under such circumstances was declared to be a misdemeanor. The trade thus prohibited was deemed to be perfectly lawful, and the prohibition was regarded as an arbitrary and unjust interference with the right to labor, which could not be justified by the police power because it could not subserve the just ends of public welfare to prohibit an honest industry, pursued by a man within his own habitation. The stirring language of Judge Earl in that case, which has become familiar from repeated quotation, is a vigorous protest against legislation of which the statute here under review is a type.

A case perhaps even more directly in point is *The People* v. *Biesecker*, 169 N. Y., 53. There the legislature enacted that "no person shall sell, offer or expose for sale any butter or other dairy products containing a preservative, but this shall not be construed to prohibit the use of salt in butter or cheese or spirituous liquor in club or other fancy cheese or sugar in condensed milk." A violation of the act was made a misdemeanor. Mr. Justice Cullen, writing the unanimous opinion of the Court, said:

> "The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment

> of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal to be valid, must be within reasonable limits, and not of such a character as to practically prohibit the manufacture or sale of that which as a matter of common knowledge is good and wholesome."

The case of *People* v. *Hawkins*, 157 N. Y., 18, is equally instructive upon this point. There the legislature made it a penal offense to sell articles made in a prison or penitentiary of any state unless stamped "convict made." The defendant was charged with the crime of having sold within the State of New York a brush made by the labor of convicts in prison in Cleveland, Ohio, not having upon it the required words. The Court said:

> "The guaranty against depriving the citizen of his liberty comprehends much more than the exemption of his person from all unlawful restraint. It includes the right to engage in any lawful business, and to exercise his faculties in all lawful ways in any lawful trade, profession or vocation. All laws, therefore, which impair or trammel these rights, or impose arbitrary conditions upon his right to earn a living in the pursuit of a lawful business are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In *People* v. *Marx*, 99 N. Y., 379, a statute prohibiting the "manufacture out of any oleaginous substances, or any compound of the same, other than that produced from unadulterated milk or of cream from the same" or the sale of the same as an article of food, and imposing penalties for violating the provision, was held unconstitutional. It was claimed that this legislation was intended for the protection of dairy products against the competition of cheaper articles of food not injurious or fraudulent. It was held that the right to conduct and follow a lawful industry could not be arbi-

trarily prohibited by the legislature for the reason that it competes with another. It is true that similar legislation was sustained in the State of Pennsylvania, and that judgment was affirmed by this Court in the case of *Powell* v. *Penn.*, 127 U. S., 678. The Court held that the presumption must be indulged that the law was in good faith enacted for the protection of the public health, and to prevent the adulteration of dairy products and fraud in the sale thereof, and that the offer to prove that the oleomargarine sold by the plaintiff was a wholesome and nutritious article did not meet the presumption. A different situation would have been presented if the offer had been to prove that oleomargarine was a wholesome and nutritious article.

It is to be observed that oleomargarine was at that time a novel article of food. The time had not come when the Court could say, as it did in *Schollenberger* v. *Penn.*, 171 U. S., 1, where the question before the Court was whether oleomargarine was an article of interstate commerce, that "if properly and honestly manufactured it is conceded to be a healthy and nutritious article of food," and where the same act was held to be unconstitutional, so far as it prohibited the introduction of oleomargarine from another State and its sale in original packages.

An illustration even more forcible is found in *Collins* v. *New Hampshire*, 171 U. S., 30, where the statute made it an offense to sell oleomargarine not colored pink. Although the statute did not in terms extend sales without the State, the act was held unconstitutional as being in contravention of the commerce clause.

Of a similar character, although arising under legislation of a different class, was the decision in the case of *Minnesota* v. *Barber* (136 U. S., 313), where this Court held that a law of the State of Minnesota prohibiting the sale of any fresh beef, &c., except such as had been taken from an animal

inspected in the State within 24 hours before the slaughter, was in violation of the Constitution of the United States giving Congress power to regulate commerce, as well as the provision declaring the citizens of each State entitled to all the privileges and immunities of citizens of the several States. The Court said:

> "But a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the product of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep or swine, actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals, or of such meats within its limits. It is quite a different thing for a State to declare, as does Minnesota, by the necessary operation of its statute, that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State."

See also

Brimmer *v.* Rebman, 138 U. S., 78.
R. R. Co. *v.* Husen, 95 U. S., 465.

In this connection reference may properly be made to the case of *Allgeyer* v. *Louisiana* (165 U. S., 578), where the plaintiff had been fined for a violation of the Louisiana statute preventing persons from dealing with marine insurance companies that had not complied with such statute. The statute subjected any person who should fill up a certificate of

insurance under an open marine policy or by any act in that State to effect insurance on property in the State in any marine insurance company which did not in all respects comply with the laws of that State to a fine of $100 for each offense. The Court held that the plaintiff could not be held liable under this statute for filling up and mailing from New Orleans to the Atlantic Mutual Insurance Company of New York an order for a policy of insurance. The Court held that the act done within the limits of the State was a proper one, which the State Legislature had no right to prevent, and that the statute was in that regard unconstitutional. The Court said:

> "The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

That the Legislature may not, under guise of police regulation, prohibit trade in wholesome articles is supported by other authorities.

Dorsey v. *Texas*, 40 L. R. A., 201.
Helena v. *Dwyer*, 39 L. R. A., 266.
Baltimore v. *Radecke*, 49 Md., 417.

It scarcely need be remarked that cases like *Plumely* v. *Mass.*, 155 U. S., 461, 476, and *People* v. *Arnsberg*, 105 N. Y., 123, are not in conflict with this position. In those cases the State legislation was

held to be a valid exercise of the police power for the purpose of preventing misrepresentation and fraud as to identity, and even though the article was wholesome, it was held that such misrepresentation and fraud might be prohibited.

Nor are the principles announced in *Booth* v. *Illinois*, 184 U. S., 425, and *Otis* v. *Parker*, 187 U. S., 606, in conflict with the plaintiff's contention. In the first of these cases the defendant was indicted for a violation of a statute imposing a penalty upon a person contracting to give an option for the sale of stock. The second case was an action to recover margins deposited on the purchase of stock, based upon the provision of the constitution of the State of California that all contracts for the sale of shares of stock on margin should be void. The doctrine laid down in the Booth case, and extended in its application to the Otis case was stated as follows: That the Courts cannot interfere with statutes of this character on the ground of their unconstitutionality "unless looking through mere forms and at the substance of the matter they can see that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear unmistakable infringement of rights secured by the fundamental law." If the object of the statute in question was to prevent the importation of unwholesome and deleterious tea and to protect the community against fraud and imposition, it is self evident that the importation of wholesome teas having no element of deception cannot have any real or substantial relation to that subject. But if it be said that wholesome teas may be excluded because they may possibly be unfit for consumption because of their quality, then we say that if this is made to depend upon suspicion, and not upon fact, it has the inherent vice which attaches to the deprivation of liberty or property upon suspicion and not upon fact.

In Schollenberger *vs.* Pennsylvania, 171 U. S., 1,

14, it was said: "We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture with other substances, which, it is claimed, may in some instances become deleterious to health, creates the right in any State, through its legislature, to forbid the introduction of the unadulterated article into the State."

But if it be further claimed that the object of the statute was to exclude inferior teas, although pure, genuine and wholesome, then we say that this does not come within the police power nor within any power of government consistent with individual liberty, because the sale or consumption of inferior teas which are pure and fit for consumption has no real or substantial relation to the public health, morals or safety, and the exclusion under this statute is not supported on any other ground.

(3.) If the act be construed according to its language as interpreted by the Courts below and the claim of the Government, the Secretary and the board have the unquestioned right to fix a standard which will exclude wholesome tea. The right to import any tea is made to depend entirely upon the will of the board and the Secretary. Wholesome teas may, therefore, be excluded. Indeed they cannot be imported unless the Secretary permits it, and there is no provision in the law which makes it obligatory upon him to permit it.

"The constitutional validity of a law is to be decided not by what has been done under it, but what may by its authority be done."

Stuart v. *Palmer*, 74 N. Y., 183, 188.

Cited with approval in Montana Co. *v.* St. Louis M. & M. Co., 152 U. S., 160, 170.

The validity of the statute "must be determined by the nature, character and scope of the powers attempted to be conferred, although they may not have been actually exercised" (People *v.* Mosher,

163 N. Y., 39, 42; Colon *v.* Lisk, 153 N. Y., 194; Gilman *v.* Tucker, 128 N. Y., 190).

The practical administration of the law, as shown in the cases at bar, has, therefore, no direct bearing upon the question of constitutionality. It assists only in showing how the statute is construed by the Government. In each of the cases in which evidence was interposed, it was shown that the teas sought to be imported were pure and wholesome.

In the Bidwell case the testimony was that all the teas were pure, genuine tea leaves, wholesome and fit for consumption (fols. 51, 52, 91, 92, 127, 128). No evidence was introduced by the Government, and the testimony of the plaintiffs' witnesses must, therefore, be taken as true.

If it were otherwise possible to do so, the Court is not at liberty, in view of this evidence, to presume that the teas were rejected because they were unwholesome. The Examiner by regulation is required to state the ground of rejection (Regulation 29). The teas were rejected as "inferior to the standard in quality" (fols. 13, 14), and this finding was affirmed by the Board of General Appraisers (fol. 17). But the quality of the tea does not refer to its wholesomeness. It does not represent hygienic qualities (*ante*, p. 24). Therefore, the finding of the examiner and the tea board was not inconsistent but in harmony with the evidence in the case.

In the Stranahan case evidence was introduced by the defendant. Mr. Hewlett, the chairman of the board of tea experts, testified that the excluded teas were in his opinion pure (fol. 56). He said, "In my opinion there were grades inferior to No. 7 (the standard) which were perfectly pure, genuine tea leaves, free from adulteration and differed from the standard only in flavor. That was true in regard to these teas in question—the eight packages—that they differed from the standard only in flavor, that is, the flavor in my opinion was decidedly inferior to the flavor of the standard. That is the only dis-

tinction that I found between these teas and the standard" (fol. 61). This testimony is in harmony with the testimony of the plaintiff's witnesses (fols. 36, 43, 54). The finding of the tea examiner was that the teas were inferior to the standard in "quality" (fol. 6), and this finding was affirmed by the tea board of General Appraisers (fol. 6). It is not possible for the Court to presume, in the face of this evidence and finding, that the teas were impure and unwholesome.

This act, therefore, not only permits the exclusion of wholesome teas, but in actual operation excludes such teas.

6. *The Act is unconstitutional because it discriminates unequally in the importation of different kinds of tea and, therefore, denies the plaintiff the equal administration of the laws.*

(1.) The Fifth Amendment guarantees the equal protection of the law. Although it does not do so in terms, yet the equal protection of the law is a part of that liberty which it is the purpose of that Amendment to secure.

(2.) The law is unequal because it permits a different standard of excellence for the admission of different kinds of tea, and because it denies to the citizen the privilege of purchasing a lower grade of a cheap and wholesome article, and compels the purchase of a more costly and superior grade. A uniform standard of quality or excellence of all kinds of tea is manifestly impossible. The excellence of teas varies indefinitely. Teas come principally from China, Ceylon, India and Japan. Their quality depends upon climate, soil, methods of cultivation and preparation. A small chop of teas grown upon land particularly well adapted for the cultivation of the plant and carefully nurtured may be much choicer than a chop coming even from the same locality, but not produced under the same

favorable circumstances. Any attempt to admit or exclude teas upon the basis of quality must necessarily result in partiality and injustice. The importer who has built up a trade in a certain description of tea or has established constituencies in certain localities in China, Japan or Ceylon at large expense may find his industry ruined by having two-thirds of his crop refused admission because the board of experts or the Secretary of the Treasury in some particular year may think his description of tea not sufficiently good, or for some reason wish to curtail or prevent entirely the sale of that kind of tea. The next year another importer finds his teas excluded for a similar reason. There can be no uniformity in the application of such a rule. It cannot bear upon all alike. It must be oppressive to some and generous to others. It permits the board, should its members be unscrupulous, to manipulate supplies and prices for their own interests or gain.

Moreover there is in the statute no restraint upon a change of standards at any time. Although the board is appointed annually and the Secretary has heretofore established annual standards, yet this is merely optional. The statute neither requires annual standards nor limits the power to annual action. The board and the Secretary may to-morrow establish new standards and put them in operation and so exclude a large proportion of the teas now in transit which would be admissible under present standards. The constitutionality of a statute, as has been already stated, is to be determined not by what has been done but by what may rightfully be done under it.

Montana Coal Co. v. *St. Louis Mine Co., supra, and cases cited, ante,* p. 61.

The law is equally oppressive to the consumer. Everybody knows that different races and classes have varying tastes in foods and drinks which they indulge without apparent injury, those that

are commonest and coarsest often furnishing the most nutriment and securing the most robust health. If the purpose of this law is to secure the consumption of a better or superior class of teas, it is unconstitutional for the same reason that any sumptuary law would be unconstitutional. It has been supposed that under the rule of civil liberty a man had the right to eat and drink such food as he might chose provided it was not injurious to his health or morals, or likely to endanger the welfare of his fellow-men. "In former times sumptuary laws were sometimes passed and they were even deemed essential in republics to restrain the luxuries so fatal to that species of government. But the ideas which suggested such laws are now exploded entirely, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law" (Cooley Cons. Lim., 7th Ed., p. 549). A law to cultivate a fine taste in teas is as obnoxious as a law to repress an over-fastidious taste in teas. Neither one or the other come within the province of government. One of the Judges of this court expressed the feeling which instinctively opposes such legislation when he said, "The paternal theory of government is to me odious" (Brewer, *J.*, in *People* v. *Budd*, 143 U. S., 517).

Since it is apparent that the real purpose of this law as administered is not merely to prevent fraud and deception or the sale of an injurious article, we must look for some other purpose. This is a measure admirably adapted to regulate supply and demand so as to enhance values and prevent the market from becoming overstocked in any given season and to prevent the decline in prices which would result therefrom. It is a great boon to the wholesale grocer, jobber and middleman, because it prevents the sale of surplus stocks at auction and tends to keep up a uniform scale of prices while all risk of loss is im-

posed upon the few importing houses whose teas may be shut out. It is a weapon in the hands of members of the Board of Experts which can be used to curtail or destroy entirely the business of their competitors importing descriptions of tea other than those in which they are interested. No scheme better adapted for exploiting capital employed in trade for the benefit of those who do no not furnish the capital has ever been devised. It comes within the condemnation of such cases as *People* v. *Marx* (99 N. Y., 380); *Connolly* v. *Union Sewer Pipe Co.* (184 U. S., 540, 558).

7. This law ought not to be sustained because the establishment of this precedent will open the door to methods of government which experience has shown to be fatal to liberty.

This Act presents an extreme instance of government by commission. It places one industry—a small one, to be sure—completely in the control of the Secretary of the Treasury and a board nominated by him. If this legislation is sanctioned every article of commerce imported from abroad or transhipped within the states may be regulated by a like commission placed in the hands of some official and a board designated by him.

Since State lines for the purpose of commerce are practically obliterated, this would mean the placing of all trade and commerce in the hands of such commissions. A bureaucracy over trade is thus established with all the inevitable abuses which attend the system.

This law defended as possibly injurious to a few while beneficent to the many, if sustained, will find successors. "One precedent creates another. They soon accumulate and constitute law. What yesterday was fact to-day is doctrine. Examples are supposed to justify the most dangerous measures, and when they do not suit exactly the defect is supplied by analogy." It is well to heed the language of Mr.

Justice Bradley in *Boyd* v. U. S. (116 U. S., 635). "It may be that it is the obnoxious thing in its mildest and least reprehensive form; but illegitimate and unconstitutional practices get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. * * * It is the duty of Courts to be watchful for the constitutional rights of citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

II.

The act is unconstitutional because it attempts to delegate to the Secretary of the Treasury and a board named by him legislative powers which can only be exercised by Congress.

1. The Constitution confers upon Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes (Art. 1, Section 8).

It is unnecessary to argue that an attempt to exercise this power by any person or body other than Congress would be an usurpation and a bold defiance of the Constitution, which could not be justified by the pretense that Congress had abrogated or surrendered its power.

If an argument could be framed that a State legislature by reason of supposed omnipotence might confer legislative power upon the Executive, no such argument can be supported in respect to a congressional power which is express and defined.

2. If Congress has not by this enactment established a rule of law as to the admission and exclusion of teas, but has authorized the Secretary of the Treasury to establish such a rule of law, then it is a matter of no importance whether we call this a delegation of legislative power or whether we say that it confers arbitrary powers upon the Secretary of the Treasury. In either event it is equally destructive of liberty and obnoxious to the letter and spirit of the Constitution.

The Constitution does not in terms prohibit the delegation of legislative power; few of the State constitutions do, and yet legislative power cannot be constitutionally delegated because to do so is to set up an arbitrary government vested in an individual or a body outside of the legislative authority provided by the Constitution. This is destructive of republican institutions and constitutional freedom, and, therefore, repugnant to the Constitution.

8. Apart from the many individual expressions found in the opinions of the Judges of this Court, it has been expressly decided in the case of *Stoutenbergh* v. *Hennick*, 129 U. S., 148, that the power to regulate commerce cannot be delegated. In that case it appeared that the legislative assembly in the District of Columbia, acting under powers supposed to have been granted by Congress, undertook to prohibit any person from engaging in business in the District without having first procured a license. A resident of the State of Maryland having violated this provision was arrested, and the question arose whether the action of the legislative assembly was authorized. The Court held that inasmuch as the right to impose such a requirement as against the resident of another State had been adjudged to be a regulation of commerce within the exclusive control of Congress (*Robbins* v. *Shelby County*, 120 U. S., 489; *Asher* v. *Texas*, 128 U. S., 129), Con-

gress could not delegate its power, and, therefore, the action of the Municipal Assembly could not be supported by any grant of authority supposed to be derived from Congress.

The instances in which Federal and State courts have declared legislation unconstitutional as being an attempted delegation of legislative power are numerous. We cite a few of them:

In *Dent* v. *U. S.*, 71 Pac., 920, it appeared that Congress had directed the Secretary of the Treasury to make provisions for the protection of the public forest and forest reservations, against destruction by fire and depredations, and to make such rules and regulations as would insure the objects of such reservations, and to regulate their occupancy and use, and any violation of the provisions of the act or of such rules and regulations should be punished as provided. Under the power so conferred the Secretary promulgated certain regulations, among which was one prohibiting the pasturing of sheep on the public lands in a forest reservation. The defendant was prosecuted for an infringement of this regulation. The Supreme Court of Arizona held that the act was unconstitutional as being an attempted delegation of legislative power, concurring with the opinion of the District Judge of Southern California, in *U. S.* v. *Blasingame*, 116 Fed., 654, and differing with the District Judge of Idaho, in *U. S.* v. *Dastervignes*, 118 Fed., 199.

In *U. S.* v. *Keokuk Co.*, 45 Fed. Rep., 178, and *U. S.* v. *Rider*, 50 Fed. Rep., 406, it was held that Congress could not confer upon the Secretary of War the power to determine when and where a bridge should be built over the navigable rivers of the country, because that is a regulation of commerce. On appeal to this Court, in the latter case, the question of delegation of legislative power was left open, the case going off on a different point (*Rider* v. *U. S.*, 178 U. S., 251; see also *U. S.* v. *City of Moline*, 82 Fed. R., 592).

In *Harmon* v. *Ohio*, 66 Ohio St., 249; 58 L. R. A., 618, an act which provided for the appointment of a chief engineer by the Governor, with the power to appoint six district engineers, to whom persons desiring to act as steam engineers might make application for a license and "if, upon examination, the applicant is found trustworthy and competent, the license should be granted him," was held unconstitutional as furnishing no standard of qualification, but as leaving all to the opinion, finding and caprice of the examiner, and hence invalid as a delegation of legislative power.

In *Schazlin* v. *Cabaniss*, 67 Pac. Rep., 755, an act authorizing the Commissioner of Labor to direct what, if any contrivance, shall be set up in a factory to prevent the inhalation of filaments or injurious gases was declared unconstitutional.

In *Dowling* v. *Insurance Co.*, 31 L. R. A., 112, and *O'Neil* v. *Insurance Co.*, 166 Pa., 71, the authority conferred by the Legislature upon the Commissioner of Insurance to fix a standard form of insurance policy and forbidding the use of any other was held to be a delegation of legislative power.

In *Adams* v. *Brudge*, 95 Wis., 390, a statute was held unconstitutional which authorized a school board to make such a rule as would prevent the attendance of children at school who had not been vaccinated.

In *Barto* v. *Himrod*, 8 N. Y., 483, where the fact of an act passed by the Legislature becoming a law was made to depend upon the result of a popular vote, the Act was held to be unconstitutional and void as being an attempted delegation of legislative power.

These cases, as well as the expressions made use of by the Supreme Court in *Field* v. *Clark* (143 U. S., 649) an *In re Kollock* (165 U. S., 526); *U. S* v. *Eaton* (144 U. S., 677); *Kilburn* v. *Thompson* (103 U. S., 168, 191), sufficiently demonstrate that where it appears that legislative power has been delegated, such action will be held unconstitutional.

The practical difficulty is to determine when there has been a delegation of legislative power.

4. The test of delegation of legislative power has been carefully stated by this Court. Speaking of the line of distinction between legislative power and executive action, Mr. Justice Harlan, quoting the opinion in *R. R. Co.* v. *Commissioners*, 1 Ohio State, said: "The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made" (*Field*, 143 U. S., 649, 691).

So in *Miller* v. *Mayor*, 109 U. S., 385, the Court said: "The efficacy of the act as to the declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingencies upon which the act shall take effect may be left to such agencies as it may designate."

These declarations of the rule have been uniformly accepted.

5. While "the legislature may delegate powers not legislative which it may rightfully exercise itself" (*Wayman* v. *Southard*, 10 Wheat., 43) it cannot under the guise of conferring discretion confer an authority to make the law.

By this statute all teas are excluded from import. No one has a right to import tea until the Secretary makes a standard. He, therefore, makes the right. But if the Secretary is bound to establish standards according to some rule, and he is merely performing an executive function, then if he does not fix the standard according to the rule his act is invalid and the citizen's legal rights have been invaded. But has the citizen any remedy—not by *certiorari* (*U. S. ex rel. Hamilton* v. *Gage*, appendix); not by mandamus, because the power is discretionary and

it cannot be controlled by mandamus, although abused (*U. S.* v. *Lynch*, 137 U. S., 280); plainly not by suit against the Secretary for damages. Can he compel the Collector to admit the teas, or answer in damages—plainly not if the contention of the Government is right that all teas are excluded which are not within the standard, even though the Secretary may have erred in establishing the standard, for then the teas are within the general exclusion. It follows that since there is no remedy the Secretary is bound by no rule.

The powers conferred are vague and undefined affording no protection to the citizen and fastening no liability upon the Secretary.

6. The counsel for the Government calls attention to a number of cases in which officers have been clothed with certain discretionary powers, as though they were analogous to and sustained the present statute.

(1.) Thus reference is made to the decision in *The Brig Aurora*, 7 Cranch, 382, where the President was authorized to declare the termination of the Non-Intercourse Act upon the happening of certain events. This case and others of the same character are sustained upon the theory that when the statute came from the hands of the Legislature it was law which was made to take effect or terminate upon the happening of a certain event, to be certified by the President or other officer. Plainly, both the law itself and the direction as to when it shall take effect and terminate are both prescribed by the legislative will (*Field* v. *Clark*, 143 U. S., 649; *Barto* v. *Himrod*, 8 N. Y., 483).

(2.) Reference also is made to discretionary powers conferred upon boards authorized to establish rules and to give certificates entitling persons to practice certain professions and pursuits. We have already considered these cases to some extent. A distinguishing feature is that the discretion is

never arbitrary or final, but is always subject to review; it is directed to the ascertainment of certain facts, upon the existence of which the right to practice the calling or pursuit depends, and not upon the will of the board. These facts are definite and certain, and are recognized as the requirements of the Legislature, and not of the board. Other instances are referred to where persons have been prohibited from using public streets and places without first obtaining license from the mayor and other officials, as in *Wilson* v. *Eureka City*, 173 U. S., 32, and the cases there cited. But these cases stand upon the municipal ownership of public places and the control of public streets for public purposes. In general they relate to ordinances by which persons desirous of making special use of public streets and places are required to obtain a permit from an official before doing so. Such ordinances would stand on a different footing if they required every person to obtain a permit from an official before he could use the streets or public places for ordinary purposes of travel or traffic.

Cicero Lumber Co. v. *Cicero*, 176 Ill., 9; 42 L. R. A., 696.

(3.) Executive officers are frequently empowered to make regulations to carry into effect duties imposed upon them. These are rules and methods of administration. The power to make such regulations would have some application in this case if Congress had prohibited the importation of impure and unwholesome tea, and if it had then required the secretary to fix a standard of purity and wholesomeness as a rule of administration. In that event, if he had established a standard which excluded pure and wholesome teas he would have exceeded his authority.

Morrell v. *Jones*, 106 U. S., 466;
U. S. v. *Eaton*, 144 U. S., 677;
U. S. v. *Three Barrels of Whiskey*, 77 Fed. Rep., 963.

It has been repeatedly held that under the power to make regulations the Executive can neither extend nor contract the law.

Balfour v. *Sullivan*, 19 Fed. Rep., 578;
Pascal v. *Sullivan*, 21 Fed. Rep., 496;
Siegfried v. *Phelps*, 40 Fed. Rep., 660,

and cases above cited.

(4.) The case of *Dunlap* v. *U. S.*, 173 U. S., 65, is not analogous to the case at bar. There a rebate on tax on alcohol used in the arts was granted when the alcohol was used under regulations to be prescribed by the Secretary of the Treasury. The Court held that the taxpayer had no present right to the rebate until the regulation was made. It was a privilege granted on certain conditions, which were left to some extent to the discretion of the Secretary. There was no interference either with a natural or vested right.

(5.) The case of the *Consolidated Coal Co.* v. *Illinois*, 185 U. S., 203, is distinguishable in several features from the case at bar. That was an action to recover fees for the inspection of coal mines under a statute which authorized an inspector to fix a fee of not less than six dollars and not more than ten dollars for each inspection, and made it his duty to inspect as often as he might deem it necessary and proper, but at least four times a year. This Court held that the inspection of mines for the protection of the health and safety of operatives was a proper subject of police legislation, and that the discretion lodged with the inspector was not arbitrary. It is obvious that there was a limit to the number of inspections as well as to the fees that could be charged. If the statute had authorized the inspector not only to make as many inspections as he thought it necessary, but to charge such a fee as he thought proper it is not probable that the same conclusion could have been reached. In that event there would

have been nothing to prevent the confiscation of the miner's entire property for inspection fees.

(6.) Reference is made to a number of statutes, and more might be cited, where powers apparently legislative have been conferred upon boards and officers, which have never been brought under review by the courts. It may be that the administration of these laws, although unconstitutional, has been such that no one has sustained a sufficient injury to provoke him to the annoyance and expense of testing their constitutionality, and in many instances arbitrary powers are beneficiently administered. No argument in support of the tea act can be properly drawn from these untested statutes.

III.

The act is unconstitutional, because it does not provide that notice and an opportunity to be heard be afforded the importer before the rejection of his tea by the tea examiner, or the Tea Board of General Appraisers.

The proceedings upon the examination of teas by the tea examiner are set out in Sections 4 and 5 of the act. The importer is required to submit samples of each line of tea to the examiner, with a sworn statement that the samples represent the true quality of each and every part of the invoice.

The tests to be applied are stated in Section 7. It is provided that "the purity, quality and fitness for consumption of the same (the teas) shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis."

There is no requirement of notice to the importer of the time or place when or where the examination will be made, or of the tests applied by the inspector. The importer has no opportunity to be present or to know whether the examination is made as prescribed in the statute, hence the proceedings are not conclusive.

After his teas are rejected, the importer may enter a protest and "the matter in dispute" is then referred to a board of three general appraisers, and it is provided that if such board shall "after due examination" find the teas equal to the standard they shall be admitted, otherwise they are to be rejected. The same method of examination as that prescribed to be made by the tea examiner is to be made by the Board of General Appraisers (Section 7), except that the statute provides "that the Board of United States General Appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars" (Section 8).

There is no provision for notice to the importer of the proceedings before the Board, and no opportunity is afforded him to be present at the examination of the teas, or to witness the testing, or to know what persons, if any, are called in as expert advisors, or how they conduct their examination. In point of fact the Board of Appraisers refuse to permit the importer to be present when the teas are being examined, or to furnish him with knowledge as to what persons are called as experts.

1. However absolute may be the power of the Secretary to fix the standard, it cannot be doubted that after the standard has been fixed, and so long as it remains in force, the importer has the legal right to import teas which are equal to the standard, of which he cannot be deprived by the

examiner or by the Tea Board of General Appraisers without due process of law, the essential element of which is notice and an opportunity to appear.

We are not now concerned as to what the character of the notice shall be, or what shall be the extent of the hearing, but we are insisting that the importer is entitled to some notice and to be present at the examination and testing of the teas.

(1.) The act itself must provide for the notice, if not specifically it should fix the time and place for the hearing.

Kurtz v. *Sumption*, 2 L. R. A., 655, 144 N. Y., and Notes.
The Railroad Tax Cases, 13 Fed. Rep., 722, 752, 753.
Kurtz v. *Sumption, Treasurer*, 117 Ind., 1.
Reetz v. *Michigan*, 188 U. S., 505, 509.
Stuart v. *Palmer*, 74 N. Y., 186.

Voluntary notice will not suffice, because what is conferred as a favor to-day may be withheld to-morrow.

(2.) In *Turpin* v. *Lemon*, 187 U. S., 58, Mr. Justice Brown said, in delivering the opinion of the Court: "Due process of law was well defined by Mr. Justice Field in *Hagar* v. *Reclamation District*, 111 U. S., 701, in the following words: 'It is sufficient to observe here, that by "due process" is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in de-

privation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.'"

In *Davidson* v. *New Orleans*, 96 U. S., 97, 107, Mr. Justice Bradley, in his concurring opinion, said: "In judging what is due process of law, respect must be had to the cause and object of the taking, whether the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

See also *Lent* v. *Tillson*, 140 U. S., 316, 327.

In *Simon* v. *Craft*, 182 U. S., 427, 436, Mr. Justice White, in delivering the opinion of the Court, said: "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied, we are governed *by the substance* of things and not by mere form."

In the case of *Hagar* v. *Reclamation District Co.*, 108, 111 U. S., 701, and *Palmer* v. *McMahon*, 133 U. S., 66, the Court held: That there is a distinction between a tax imposed by direct legislative power, which calls for no inquiry into the weight of evidence, nor for anything in the nature of judicial examination before collection, and a tax imposed upon property according to its value, to be ascertained by assessors upon evidence. In the former case no notice to the owner is required; in the latter, the officers, in estimating the value act judicially, and notice and an opportunity to be heard are essential.

In Palmer *v.* McMahon, 133 U. S., 66, Mr. Chief Justice Fuller, in delivering the opinion of the Court, said: "The imposition of taxes is in its nature administrative and not judicial, but assessors

exercise *quasi* judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value."

The Examiners and the Board of General Appraisers exercise the same *quasi* judicial, or judicial powers, in determining the purity, quality and fitness for consumption of the teas, that the administrative officers in *Hagar* v. *Reclamation District* and *Palmer* v. *McMahon*, exercised in arriving at the value of the properties taxed there.

It is submitted that before appellant could be deprived of his property he should have had the benefit of such proceedings as this Court decided were "due process of law," in *Parsavant* v. *U. S.*, 148 U. S. 214, where Mr. Justice Jackson said, at page 222: "They had full notice of the proceedings before the Board of General Appraisers upon their appeal to said board, and ample opportunity to be heard on the question of the market value of the imported goods. It cannot, therefore, be properly said that they have been subjected to penalties, without notice or an opportunity to be heard, or been deprived of their property without 'due process of law.'"

This is not a proceeding for the collection of public revenue, in which cases summary remedies may be used which could not be applied in cases of a judicial character.

King *v.* Mullins, 171 U. S., 429;
Bells Gap R. *v.* Penn, 134 U. S., 232, 239.

2. The words, "due examination," in Section 6, do not import that notice or an opportunity for a hearing must be given. Such a construction would be forced and unnatural. The word "due" plainly relates to the method of conducting the examination as prescribed in the following section. The contention of the Government upon the argument before this Court in *Cruikshank* v. *Bidwell* was that the nature of the examination was such that no notice

was requisite; that the examination is a physical test to be made by the senses of the Examiner or the Board of General Appraisers, with the advice of the experts they may choose to call in, and that, therefore, the presence of the importer is of no practical importance to him. But the answer to this is that the importer is entitled to know that the proceeding is conducted in good faith and in the manner prescribed in the statute; that it is honestly conducted by disinterested experts, if experts are called. He is not to be deprived of his property by star chamber proceedings, from which he is rigidly excluded, where partial, interested and dishonest experts may be called without his knowledge to influence the judgment of the appraisers. It is not to be forgotten that the finding of the Board of General Appraisers is final; that no appeal to any court is provided; that a writ of *certiorari* does not run out of the United States courts to review the proceedings (McIntyre *v.* Wood, 7 Cranch, 504), and that State courts are without jurisdiction to issue such a writ directed to a Federal officer or board (McClung *v.* Silliman, 6 Wheat., 598).

The substance of the importer's right is that the tests prescribed by the act shall be applied to his teas, and that the persons from whom the board obtains advice shall be "persons skilled in the examination of teas" (Sec. 8). It is essential to the maintenance of these rights that the importer should at least be permitted to be present to know that the prescribed tests are applied and that the experts are in fact skilled in the examination of teas; and that he be afforded an opportunity to show, if the fact be so, that they are interested, unskilled or dishonest. That he may be present and have this knowledge it is indispensible that he have notice of the time and place of the examination. This much assuredly is essential to "due process."

IV.

The act is unconstitutional because it authorizes the confiscation of the importer's property without due process of law, as was the fact in the Stranahan case.

In the Stranahan case the teas were forcibly taken from their owner and were destroyed without any judicial finding. The statute provides for such destruction by the collector if the teas are not exported from the United States within six months after the final re-examination by the Board of General Appraisers (Section 6). It is sought to sustain this feature of the act under the authority of *Lawton* v. *Steele*, 152 U. S., 132. In that case it was held that fishing nets, which had been used in violation of law, might be seized and destroyed without judicial decree. The statute declared such nets to be treated as a public nuisance. The value of the nets in question in that case was $15. That decision appears to have proceeded upon two grounds: First, that the amount involved was too trifling to require a judicial proceeding for a forfeiture, and, second, that the aggrieved party had a remedy by replevin or trespass.

In the Stranahan case the value of the property is one hundred and twelve dollars, but all rejected teas, whatever their value, are to be destroyed under this statute, unless exported within six months. During the last year not less than 24,968 packages of tea were rejected as appears from official report. Nor is it believed that a statute providing for the summary seizure and destruction of property by an officer of the Government without process can be justified as constitutional otherwise than as the abatement of nuisance upon the ground that the citizen has a remedy of replevin or trespass.

The proceeding can be sustained only upon one of

two theories, either that the teas are a nuisance which the Government may abate by summary destruction, or that the teas are forfeited as a penalty for a violation of law.

But these teas are not a nuisance in the ordinary or legal signification of that term, unless any property, harmless and innocuous in its character, may become a nuisance by mere legislative declaration. This Court has held that such a doctrine is not to be tolerated.

Yates v. *Milwaukee*, 10 Wall., 497.

It would indeed be anomalous that teas which this year and last year and every year except the year 1901 were regarded by the public authorities as proper subject of food should by the edict of the Secretary become in that year a nuisance of such a highly dangerous character as to call for the extreme remedy of summary destruction without judicial process.

It is equally apparent that the confiscation cannot be sustained as a penalty. A penalty is a punishment for the violation of law. Assuming that the act of the importer in bringing teas into the port of New York and submitting them to the public authorities for inspection constitutes a violation of law if they are found to be unequal to the standards, it is certainly not too much to claim that before the owner shall be absolutely divested of his property as a punishment for such temerity he shall have an opportunity to be heard and to show that he has not violated the law.

If it be said that the penalty is not for trying to bring the teas in, but for failure to remove them after they had been rejected, then it is even more apparent that the penalty is inflicted without pleading, trial or judgment upon the conclusive and arbitrary finding of the collector of the port. The fact upon which the violation of law, upon this supposition, turns is the neglect to remove within six months after rejection. Whether that is a viola-

tion of law depends, therefore, upon two possible issues; first, whether the teas were lawfully rejected and second whether the time for their removal has expired. The importer might show if the opportunity were afforded him, that the law did not justify the rejection either because it was invalid or because it had not been properly enforced, or because the standards had not been legally fixed. None of these questions were concluded by the finding of the Board of General Appraisers. Without further extending this argument, already perhaps too lengthy, we refer in support of our contention to the following authorities:

Colon v. *Lisk*, 153 N. Y., 133.
Peck v. *Anderson*, 57 Cal., 251.
Dunn v. *Burleigh*, 62 Me., 24.
King v. *Hayes*, 80 Me., 206.
Lowry v. *Rainwater*, 70 Me., 152.
State v. *Robbins*, 124 Ind., 308.
Ridgway v. *West*, 60 Ind., 371.

V.

In Buttfield vs. Bidwell (No. 296), the evidence establishes a case of personal liability against the defendant.

In this case the defendant introduced no evidence. Upon the evidence submitted by the plaintiff the defendant's counsel asked the Court to instruct the jury to render a verdict for the defendant, among other things, upon the ground that "assuming the act to be unconstitutional, or if it were assumed that the Secretary had acted improperly in the matter no cause of action in tort had been established against Mr. George R. Bidwell" (Buttfield *v.* Bidwell, Record, fol. 167).

Previously to that motion the Court had held that

the plaintiff's evidence presented merely a question of law upon the record as to the unconstitutionality of the Act (fol. 159), and remarked that the evidence adduced was sufficient to warrant a direction of a verdict in the plaintiff's favor (fol. 159), if the Act was unconstitutional. We may, therefore, assume that the verdict was directed solely upon this ground of unconstitutionality. But if we examine the merits we shall find that the position taken by counsel cannot be sustained.

The evidence shows that the teas were entered for import at the Custom House, as required by law, and were sent to the bonded warehouse under the form set out at page 21.

The regulations require that the entries of teas be made on the ordinary warehouse forms and that a bond shall be taken from the importer that such tea shall not be removed from the warehouse until released by the Collector (regulation 1), and that if, on examination, the tea is found, in the opinion of the Examiner to come within the prohibitions of the law and of the regulations the importer shall be immediately notified and the tea shall not be released by the Custom House authorities unless on a re-examination called for by the importer (regulation IV.). The permit which is granted when teas are released is set out in the record at folio 26. The notice and rejection by the tea examiner is in the form set out at folio 57, and after examination by the Board of Appraisers, if the teas are still rejected, the Collector notifies the importer in the form set out at folio 59. It is impossible for the importer to obtain possession of his teas or to take them out of the warehouse except upon a permit granted by the Collector. No importer can remove or withdraw for consumption teas which have been entered without first obtaining a report of the tea examiner or of the Board of General Appraisers that the teas are equal to the standard (fol. 28), nor can he pay the duties until such a report is presented

(fol. 28). The payment of duties under such circumstances would not be accepted (fol 21). This is the regular course of business at the Custom House (fol. 20).

The act provides (Section 4) that in making entry at the Custom House of all teas the importer shall give a bond to the Collector that they shall not be removed from the warehouse "until released by the Collector" after examination. If the tea passes the examination, provided no re-examination is demanded by the Collector, a permit shall at once be granted to the importer declaring the tea free from the control of the Customs authorities, but if it is rejected the importer is to be notified, "and the tea shall not be released from the Custom House unless on a re-examination called for by the importer the finding of the Examiner shall be found to be erroneous" (Section V.).

In case a re-examination by the Board of Appraisers is demanded, if the board finds the tea equal to the standards, "a permit shall be issued by the Collector for its release and delivery to the importer, but if it be found inferior the importer must give a bond, with security satisfactory to the Collector, to export said teas within a period of six months," and if the same shall not have been exported within the specified time the Collector at the expiration of that time shall cause the same to be destroyed.

Acting under the authority of the statute and as required by its provisions, the Collector in this case refused to permit the importer to remove the goods for consumption, and the importer was by his conduct placed in the position where he was either compelled to remove the goods or suffer their destruction.

The evidence shows that the loss and expense incurred in the removal of the goods amounted to $2,281.19 (fols. 67, 161).

The plaintiff duly protested against the action of the Collector (Exhibit 16, p. 32; Exhibit 17, p. 34).

1. *The teas having been entered for import at the Custom House, were in the control of the Collector.*

The goods were put into a bonded warehouse, under provisions of law, and the Collector thereupon became the official custodian of them on behalf of the Government.

Conrad v. *Pacific Ins. Co.*, 6 Peters, 262, 281.

Tracy v. *Swartwout*, 10 Peters, 80.

This is not a case where it is sought to hold the Collector liable for the negligence, misconduct or other wrongful act of a subordinate official, but to hold him liable for the duress of goods under a duty imposed upon him by an unconstitutional law. This case is directly within the authority of *United States* v. *Lee*, 106 U. S., 196, where an action in ejectment was held to be, in its essential character, an action of trespass, with the power in the Court to restore the possession to the plaintiff as part of the judgment, and the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this Court held to be unlawful, and, therefore, insufficient as a defense (*Tindall* v. *Wesley*, (67 U. S., 119).

It is like the case of a defendant who has the key of a warehouse in which are the plaintiff's goods, put there no matter how, which the plaintiff cannot reach unless the defendant unlocks the door or authorizes somebody to do so. If he gives public notice that he will not permit the goods to be removed unless the plaintiff complies with an unlawful exaction, he is guilty of duress and conversion of the plaintiff's goods, and he cannot escape liability by saying that some subordinate placed the goods in the warehouse.

In Cruikshank *v.* Bidwell (176 U. S., 73), speaking of this statute, it was said: "The official character of the Collector, the provisions of the Act, and the regulations of the Secretary of the Treasury in exe-

cution thereof would not constitute a defense if the act were unconstitutional." That was a suit for an injunction restraining the Collector from refusing to permit the plaintiff to import tea, as well as from destroying tea under the act.

There is a long line of authorities holding that officials, acting under unconstitutional statutes which, therefore, are ineffectual to protect them, are liable for damages sustained by their wrongful act or where officials have been restrained from proceeding to enforce such unconstitutional law.

Osborn v. *Bank*, 9 Wheat., 738.
Poindexter v. *Greenhow*, 114 U. S., 270.
Pennoyer v. *McConnaughy*, 140 U. S., 1.
Smith v. *Ames*, 169 U. S., 466.
Scott v. *Donald*, 165 U. S., 56.
Tendal v. *Wesley*, 167 U. S., 204.

The same thing is true whenever an official, exceeding his lawful powers, inflicts an injury under color of office.

Siegfried v. *Phelps*, 40 Fed. Rep., 660, is an authority directly in point. That was an action to recover the value of a certain shipment of tea, arising out of the refusal of the Collector to permit the tea to be entered without presenting to him an invoice having indorsed thereon the declaration required in the case of dutiable articles. The plaintiff's contention was that the Collector had no authority to make a regulation requiring such a certificate. There was a demurrer to the complaint, which was overruled upon the ground that the Collector had no authority to exclude the teas because the certificate was not furnished. The judgment of the Court was that "the Collector unlawfully refused to allow the entry and is liable."

Other authorities to the same effect are,

Leslin v. *Hedden*, 28 Fed. Rep., 416, and
Pascal v. *Sullivan*, 21 Fed. Rep., 496.

2. *The rule that an officer is not liable for the tortious acts of his subordinate has no application where the act performed is a duty imposed by a law.*

> "There can be no doubt that the Collector is answerable for all the acts of his deputies in the performance of their official duties under him. The real question here is, therefore, whether the collection of the carrier's charges was a part of the official duty of the Collector. If it was, the collection by the deputy was an official act, and the principal officer was liable accordingly."
>
> *Cleveland, &c., Ry. Co.* v. *McCluug*, 119 U. S., 454.

See also

Belknap v. *Achild*, 161 U. S., 10, 18.
Iselin v. *Hedden*, 28 Fed. Rep., 416.
Head v. *Porter*, 48 Fed. Rep., 482.

The cases relied upon by the defendant were not cases where the subordinate was performing an official duty required by law to be done by the superior officer or under his direction, but were unauthorized acts.

3. *Where a public officer has established a regulation in the course of business that he will not do a certain act except upon certain terms which are illegal, or that he will not accept payment except upon conditions that he has no right to impose, a tender and demand are waived.*

Two experienced officials of the Custom House were called to show the course of business as established in addition to the regulations established by the Secretary of the Treasury under which the Collector refused to receive duties until after the teas had been passed by the examiner or Board of General Appraisers, or to grant a permit for their removal from a warehouse without first obtaining a report of the tea examiner or of the Board of General Appraisers that the teas are equal to the standard (p. 17, fol. 20; pp. 18, 19, 20). It would have been a useless cere-

mony, therefore, for Mr. Buttfield to have tendered the duties or to have demanded the teas. The tender and demand were, therefore, waived.

U. S. v. *Lee* (106 U. S., 196) is a direct authority on this point, where Mr. Justice Miller, reviewing the authorities, cited with approval the following language: "It is a general rule that when a tender or performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused." In that case the land commissioners had established a rule under which they refused to receive taxes except from the owner in person; that if offered by his tenant, agent or attorney in fact, it would be rejected. It was held that it would be an idle ceremony for any of these to make the offer, and that an actual tender by such persons, as it certainly would not be accepted, need not be made. The Court said:

> "That the commissioners having in the execution of the law acted upon a rule which deprived the owner of the land of an important right, a right which went to the root of the matter, a right which has in no instance known to us, or cited by counsel, been refused to a taxpayer, a sale made under such circumstances is invalid as much so as if the tax had been actually paid or tendered."

So in *Swift* v. *U. S.* (101 U. S., 22), where the Internal Revenue Bureau illegally required certain commissions to be received in stamps instead of money. Receipts and settlements made in pursuance of that requirement were not voluntary so as to preclude the claimant from recovering back payment. No formal protest was made.

> "A rule of that character deliberately adopted and made known and continuously acted upon dispenses with the necessity of proving in each instance of conformity that the compliance was coerced."

This case stands, therefore, precisely as though Mr. Buttfield had tendered the duties, and the Collector having the teas in his control had refused on demand to permit him to bring the teas into the country, or to do anything else with them except to reship them. If this action was illegal he was liable in damages (Cruikshank *v.* Bidwell). No question was raised as to the sufficiency of the proof of damage.

VI.

If the act fixes a rule of exclusion, the Standard violates that rule and affords no protection to the defendant in the destruction or exclusion of the plaintiff's teas.

If the act can be construed as prohibiting from import certain kinds of teas only and so establishes a rule of exclusion, then three questions are presented: (1) What is the rule of exclusion? (2) Does the standard violate that rule? and (3) Are the teas in question entitled to import under the rule established by the act?

1. If the act fixes any rule of exclusion, it is one which excludes only unwholesome tea, and authorizes the Secretary of the Treasury to fix a standard of wholesomeness, the purity being measured by the wholesomeness; the quality being measured by the wholesomeness; and the fitness for consumption being measured by the wholesomeness, these three specifications being attributes relative to the wholesomeness of the teas as an article of food.

We have dwelt at so much length upon the language, history and character of the statute that it is unnecessary to restate the considerations which demonstrate the impossibility of sustaining the

statute as a legal and constitutional enactment, except by adopting this construction. In order to adopt it, however, the Court is compelled to subordinate the phraseology of the language to the title of the act, and to ignore the purpose of the legislation as disclosed by the Senate report and this construction of the Statute has been consistently repudiated by the government and by the courts.

2. Assuming that Congress excluded merely unwholesome tea, and authorized the fixing of standards as above stated of purity, quality and fitness for consumption relatively merely to the wholesomeness of the tea as an article of food, it follows that neither the Board nor the Secretary had the right to establish standards which would exclude wholesome tea, or to establish standards which, as to purity, quality and fitness for consumption, were based upon any other attributes than those relating to wholesomeness.

The Secretary of the Treasury cannot by his resolutions alter or amend the law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted.

U. S. v. *Eaton*, 144 U. S., 66–77.
Morrill v. *Jones*, 106 U. S., 466.
Tracy v. *Swartout*, 10 Peters, 80.
Teal v. *Felton*, 12 How., 284.

The discretion that the Secretary and Board have in establishing the standards is on this supposition to be exercised in ascertaining the fact of wholesomeness. It cannot extend the operation of the act. The evidence in this case demonstrates that the standards were fixed not to exclude unwholesome tea merely, but also to exclude teas which are perfectly wholesome, merely because of their inferiority in grade.

In the Bidwell case the evidence is that all the grades from No. 6 to 15 on the schedule (Exhibit 12, p. 24) are pure, wholesome and free from adul-

teration and fit for consumption, and admissible under the standards fixed previous to 1901 (fols. 51, 91, 92, 129).

In the Stranahan case the evidence was that the grades below the standard were perfectly fit for consumption down to No. 15. The standard excluded all Fychow and Wenchow teas; that these teas are ordinary subjects of commerce and are pure, wholesome and suitable for consumption (fols. 41, 43). The witness called by the Government testified that the tea in question was a pure tea but of a low quality (fol. 57); that the standard is a fine quality of tea. He adds, "In my opinion there were grades inferior to No. 7 which were perfectly pure, genuine tea leaves, free from adulteration and different from the standard only in the flavor. That was true in regard to these teas in question—the eight packages that they differed from the standard only in flavor, that is, the flavor in my opinion was decidedly inferior to the flavor of the standard, that is the only distinction that I found between these teas and the standard" (fol. 61). He also testified that there are teas produced which are pure but inferior in cup quality that were suitable for standards, but they could not be bought in necessary quantities for Government samples at the time the standards were fixed (fol. 62). It is thus demonstrated by the record in both cases that the standard excluded teas which neither in respect to their purity, quality or fitness for consumption were unwholesome, and were not within the rule of exclusion fixed by the statute if any rule was fixed thereby.

3. The evidence is conclusive and uncontradicted that the plaintiff's teas in both cases were pure, wholesome, fit for consumption, free from adulteration and in every way such as are entitled to be imported if the rule of exclusion has regard merely to wholesomeness.

It may be said that being Country Green teas, they were not free from coloring matter (Buttfield

v. Stranahan, Record, fol. 76); but Mr. Hewlett, the chairman of the board, testified that the teas in question were pure teas. The mere fact that green teas have coloring matter is no evidence that the teas are impure. The evidence is that the teas had no more coloring matter than the standard, nor did any of the lower grades of Country Green teas (fols. 76, 77).

It appears that out of the twelve hundred and ninety-eight packages of tea, the subject matter of the Bidwell case, nine hundred and sixty-three were rejected as "inferior to the standard in quality," and three hundred and thirty-five as "inferior in quality, smoky Fychows."

The eight packages, the subject matter of the Stranahan case, were all rejected "as inferior to standard in quality" (fol. 6).

The examiner is required to state the particular cause of each rejection, "whether it be on the ground of quality, character of infusion, dust, scum or admixture with foreign substance" (Regulation 29).

The regulations distinguish between quality and quality or character of infusion. Examiners are required to test all teas for "quality, for any foreign matter on the surface of the infusion, sometimes called scum, and for quality of infusion" (Regulation 20), and if inferior to the standard in any one of these requisites the tea shall be rejected, notwithstanding that it be superior to the standard in some other qualifications (Regulations 20 and 22).

Regulation 20 relates to examination for quality; regulation 21 to examination for quality of infusion or quality of infused leaf. The former relates to the taste and flavor of the tea, the latter to the character of the leaf; that is, the appearance of the leaf, and whether the mass of tea examined shows a larger quantity of exhausted or decayed leaf or foreign substance than the standard.

In the cases before the Court the teas were rejected as being inferior in quality, not as being inferior

in quality of infusion. Quality is to be ascertained according to customs of the tea trade (Regulation 20), and it is provided "that the quality must be equal to the standard, but the flavor may be that of a different district as long as it is equal in sweetness." The word "sweetness" relates to the general excellence of the tea as determined by taste and smell. It is ascertained by what is known as the cup test (Record, Buttfield *v.* Stranahan, fols. 36, 38, 44, 45, 60, 62; Record, Buttfield *v.* Bidwell, fols. 112, 113, 137, 140, 141, 146, 149). In comparing teas with the standard as to quality, the question to be determined is whether in taste and smell they are equal to the standard (above citations). The position of the Government is stated as follows: "That the act of 1897 authorizes the board to established standards which take into consideration not only purity and wholesomeness, but also quality, meaning thereby the attributes that are tested by the sense of smell and taste" (Bidwell case, Record, fol. 54).

It is not open to question that in the Bidwell and Stranahan cases the teas were rejected by the examiner and by the Board of General Appraisers simply because they were not found to be equal to the standard in cup quality; that is, in delicacy of taste and smell. Some of the teas in the Bidwell case were rejected upon the ground of quality, with the additional statement that they were "smoky Fychows." But on appeal to the Board of General Appraisers all the teas were rejected as inferior in quality (Bidwell record, p. 16). There is no reason to assume that because teas have a smoky flavor, they are therefore unfit for consumption, or that they are unwholesome.

VIa.

If the Act fixes a rule of exclusion the teas in the Stranahan and Bidwell cases were wrongfully rejected.

Assuming that the Act fixes a rule of exclusion and that the expressed intention was to exclude unwholesome teas, such as by reason of their want of purity were unwholesome, or such as by reason of their quality were unwholesome, or such as by reason of their unfitness for consumption were unwholesome, and that the Board and Secretary were authorized to fix standards as administrative acts for the exclusion of such teas, then the teas in question were improperly rejected.

The evidence is conclusive in each of these cases that the teas were equal to the standard in purity, wholesomeness and fitness for consumption and in every attribute of quality except in taste and flavor.

The plaintiff in error was entitled to show upon the trial that the teas were equal to the standard. He was not precluded from doing so by the finding of the examiner or by the finding of the Board of General Appraisers because he was not a party to either of those findings. The Act did not provide for notice to him of either proceeding, nor does it appear that he had notice of either proceeding. He was, therefore, at liberty to bring his action against those who wrongfully interfered with his property, or prevented him from exercising his legal rights of ownership, and the Collector in this action cannot rely upon the finding of the examiner or of the Board of General Appraisers as a justification for the destruction of the teas, or for his action in excluding them from import.

People ex rel. Copcutt vs. *Board of Health*, 140 N. Y., 1.

VII.

In the Seven Package case the plaintiff in error is not estopped from questioning the constitutionality of the act and in that case the judgment was erroneous if the act was unconstitutional.

The action was brought to enforce a forfeiture pursuant to the ninth section of the act, cited *supra*, page 16. The right of recovery was grounded in the act itself. If the act was invalid, there was no right of recovery (see opinion of Thomas, *J.*, Record, p.).

1. It was claimed by the Government in the Court below that the plaintiff was estopped by reason of having given a bond, after their rejection, for the removal of the goods, from denying the constitutionality of the act. The bond was given under duress. The importer must remove his goods or suffer them to be destroyed. If the act was unconstitutional the bond was plainly void as being without consideration, and extorted by duress, and the giving of the bond under such circumstances would not operate as an estoppel.

O'Brien v. *Wheelock*, 184 U. S., 450.
Coburn v. *Townsend*, 103 Cal., 233.
Am. & Eng. Ency. of Law (2d ed.), vol. 4, p. 667.

Moreover, the averment in the information as to the bond was impertinent to the issue and, therefore, was not admitted by the demurrer. The right of forfeiture, if one existed, was shown by the statement that the teas were imported, rejected, exported and reimported. These are the only facts necessary to a forfeiture under the act. The Government is not in this action seeking to enforce the bond.

2. If the act was unconstitutional, either (1) because it deprived the plaintiff of his property without due process of law, as argued under either head of the second point of this brief, or (2) because there was an attempted delegation of the legislative power, or (3) because the act did not provide for due notice, appearance or hearing upon the examination of the teas, the act was wholly void because it is impossible to sever the invalid provisions from the valid provisions, if there be any.

Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S., 636.

Spraigue v. *Thompson*, 118 U. S., 93, 95.

Trade Mark Cases, 100 U. S., 98.

VIII.

The judgments in the cases of Buttfield v. Stranahan and Buttfield v. Bidwell should be reversed and the cases remanded with instructions to enter judgments in each case for the amount of damages proven, with interest and costs, and the judgment in the case of Buttfield, claimant, v. The United States, should be reversed and judgment directed for the claimant, dismissing the information.

All of which is respectfully submitted.

Dated New York, December 23, 1903.

JAMES L. BISHOP,
JAMES H. SIMPSON,
Counsel for Plaintiff in Error.

[L6045]

AN ACT TO PREVENT THE IMPORTATION OF IMPURE AND UNWHOLESOME TEA.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this Act, and the importation of all such merchandise is hereby prohibited.

SEC. 2. That immediately after the passage of this Act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs."

SEC. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

SEC. 4. That on making entry at the custom-house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or, in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this Act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other

revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however*, That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be), under the provisions of this Act.

SEC. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no reexamination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination, such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom-house, unless on a reexamination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in section 6.

SEC. 6. That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal

in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reexamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

SEC. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of the said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this Act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reexamination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this Act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

SEC. 8. That in cases of reexamination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such

board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

SEC 9. That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

SEC. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations.

SEC. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this Act shall not be subject to the prohibition hereof, but the provisions of the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

SEC. 12. That the Act entitled "An Act to prevent the importation of adulterated and spurious teas,"

approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this Act goes into effect.

Approved, March 2, 1897.

Regulations.

The following are a portion of the regulations for the entry and examination of imported teas:

I. The importation of any merchandise for sale as tea which is inferior in purity, quality, and fitness for consumption to the standards fixed and established by the Secretary of the Treasury, in accordance with section 3 of the tea act, is prohibited.

Importations of tea may be entered either for consumption, warehouse, warehouse and transportation, warehouse and immediate exportation, transit to Canada or Mexico, or for immediate transportation without appraisement, and all entries must be on the regular forms, and the regular serial numbers for both bonds and entries should be used. (T. D. 18065, 20014, 21913.)

Tea entered for consumption must be stored in warehouse pending examination, and special bond must be taken by the collector as provided in section 4, act March 2, 1897.

A bond shall be taken from the importer that such tea shall not be removed from the warehouse until released by the collector. This bond (Cat. No. 821) shall be under a penalty equal to double the amount of the estimated duties on the tea, and shall also be conditioned for the payment of all custom house charges which may attach to the merchandise prior to its being released, exported, or destroyed, as the case may be, under the provisions of law.

II. The examination of teas shall be made by means of samples to be drawn from packages designated by the collector and to be furnished by the importer, and of additional samples to be obtained by

the examiner. The importer shall furnish a sworn statement that any samples submitted by him to the examiner are drawn from packages designated by the collector and covered by his entry (naming the vessel), and that to the best of his knowledge and belief they represent the true qualities of each and every part of the invoice (including the proportion of dust), and accord with the specifications therein contained. The importer shall submit with his entry a chop list or specification of the several lines included in the invoice, and the collector shall select for examination packages representing the different lines. The examination and report upon such samples shall be made in accordance with the provisions of section 7 of the above act.

V. If, after examination, the tea is found not to be prohibited under the act, a permit shall at once be granted to the importer declaring the tea free from control of the customs authorities; but if, on examination, such tea, or merchandise described as tea, is found, in the opinion of the examiner, to come within the prohibitions of the law and of these regulations, the importer shall be immediately notified, and the tea, or merchandise described as tea, so returned, shall not be released by the custom-house authorities, unless on a reexamination called for by the importer the return of the examiner shall be found erroneous. Should a portion only of the invoice be passed by the examiner as correct, a permit of delivery shall be granted for that portion and the remainder be held as provided in section 6 of the act. Any portion of an importation of tea entered for consumption which may be rejected will be held under the special tea bond until it is either destroyed or exported according to law, and the entry is not to be accounted for to the Treasury Department in the warehouse and bond account.

VI. In case the collector, importer, or consignee shall protest against the finding of the examiner,

the matter in dispute shall be referred for decision to a board of three United States general appraisers, designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, as provided in these regulations.

XI. The examination of tea by examiners or boards of United States general appraisers under this act shall be made according to the usages and customs of the tea trade, including the testing of an infusion in boiling water, and, if necessary, chemical analysis.

XII. Warehouses for the storage of tea will be designated by the collector, and the proprietor thereof will be required to give a bond in the form prescribed. Teas not stored in such designated warehouses will be placed in general order store or in public store pending examination and release on proper permit. In the absence of proper storage facilities at custom-houses, teas may be retained in locked cars as constructive warehouses, under proper supervision, pending examination.

The importer's premises may be designated as warehouses for the storage of tea, on the filing of the bond provided for by these regulations, but whenever, in the discretion of the collector, it shall be considered desirable a storekeeper shall be assigned to the supervision of such premises at the importer's expense while the teas shall remain under bond therein.

XIII. When tea under examination is stored in any warehouse it must be so placed as to be separate from other merchandise, and so as to allow convenient supervision by customs officers. At ports where there are no bonded warehouses, class 2 or 3, the chief officer at the port will, when necessary, procure suitable premises for the temporary storage of any tea arriving at his port.

All expenses of storage, cartage, and labor must be paid by the importer.

XIX. The following are the standards selected by the board of tea experts, which are hereby fixed and established as standards under this act for the year 1901:

No. 1. Formosa Oolong.
No. 2. Foochow Oolong.
No. 3. North China Congou.
No. 4. South China Congou.
No. 5. India tea (use for Ceylon tea).
No. 6. Pingsuey, green tea.
No. 7. Country green tea.
No. 8. Japan tea, pan fired (use for sun dried).
No. 9. Japan tea, basket fired.
No. 10. Japan tea, dust or fannings.
No. 11. Capers (use for scented Orange Pekoe).
No. 12. Canton Oolong (*a*)
No. 13. Scented Canton (*a*)

COMPARISON WITH STANDARDS.

XX. In comparing with standards, examiners are to test all the teas on these points, namely: For quality, for any foreign matter on the surface of the infusion, sometimes called scum, and for quality of infusion. Quality shall be ascertained by drawing according to the custom of the tea trade with the weight of a half dime to the cup. The quality must

a These standards (Nos. 17 and 18 for the year 1900) continued in force.

be equal to standard, but the flavor may be that of a different district as long as it is equal in sweetness. As an illustration, a Teenkai may be equal to a Moyune, but a distinctly smoky or rank Fychow, or Wenchow of sour character, must not be considered as equal to the two first mentioned.

XXI. In order to test for floating coloring matter or scum, and also for the quality of infusion, a second drawing should be made of double the foregoing weight. Before disturbing the infusion examination should be made for any floating substance, and after pouring off the water the infused leaf should be taken out so as to exhibit the lower side which rested against the cup. Should the mass show a larger quantity of exhausted or decayed leaf or foreign substance than the standard, it shall be considered inferior in quality, and the tea must be rejected. In Greens and Japans particularly the brightness of the leaf should be considered as an evidence of quality.

XXII. Should a tea prove, on examination, to be inferior to the standard in any one of the requisites, viz, quality, scum, or quality of infusion, it shall be rejected, notwithstanding that it be superior to the standard in some of the qualifications. No consideration shall be given to the appearance or so-called style of the dry leaf.

XXIX. In all cases of rejections by examiners, the importer should be notified of the reason for rejection—that is, whether it be on the ground of quality, character of infusion, dust, scum, or admixture with foreign substance.

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54TH CONGRESS, 2d Session. } CALENDAR No. 1678. SENATE. { REPORT No. 1527.

ADULTERATED TEA.

February 23, 1897.—Ordered to be printed.

Mr. WHITE, from the Committee on Commerce, submitted the following

REPORT.

(To accompany S. 3725.)

The Committee on Commerce, to whom was referred the bill (S. 3581) to prevent the importation of impure and unwholesome tea, beg leave to report that the same has been carefully examined, and a substitute (S. 3725) for said bill is herewith presented, with the recommendation that the same do pass.

The committee not only took evidence upon the subject, but likewise submitted the original bill to the Secretary of the Treasury, who reported a draft of a substitute, which is practically identical with the proposition herewith recommended for passage. The subject of the regulation of the importation of tea and the exclusion of impure teas has heretofore engaged the attention of Congress. An effort was made to remedy the evils justly complained of by an act entitled "An act to prevent the importation of adulterated and spurious teas," approved March 2, 1883. That measure, however, has failed to accomplish its purpose, but its operation has suggested defects which can be cured and which it is believed will be remedied by the enactment of this measure. It is well known that the people of the United States receive on an average poorer teas than the consumers of any other civilized country.

Much of the merchandise sold as tea is unwhole-

some and is disposed of at an enormous profit. These facts account for the circumstance that while the *per capita* consumption of tea is increasing in Great Britain statistics show a decided reduction in this country. The Treasury Department is fully alive to the situation and has co-operated with the committee as already stated.

Among the various arguments presented to the committee in favor of the present bill we find the following, which quite fully explains the object in view and the defects in previous legislation designated to be remedied. The same is herewith submitted:

LAW TO REGULATE ADULTERATED TEA.

Object of the present law.—The original law was constituted to prevent the sale of the tea unfit for use. Inspectors appointed by the Government at about thirty or more ports of entry were authorized to exclude teas which in their opinion contained adulterated or exhausted leaves, or were unfit for use. The importer was privileged to appeal from this decision and call for an arbitration, in which case the Government appointed an arbitrator, the importer one also, and the two arbitrators a third in case of disagreement, who decided the case. If the teas were excluded, they were to be taken out of the country or destroyed.

How the present law has worked in practice — The inspectors found that having no guide as to what constituted tea unfit for use, they were obliged to decide according to their own impressions of the moment—necessarily vague—which resulted in the shutting out of a tea to-day which would be admitted to-morrow. It has happened that the same identical tea divided up under different marks, has been unknowingly admitted and rejected by inspectors on the same day, under the supposition that the teas were different. It has frequently happened that teas excluded by one

inspector have been shipped to Canada or England and imported again through a different inspector at another port. Furthermore the same tea has been excluded and brought in again through the same inspector at the same port, simply because his views or those of the arbitrator in regard to adulteration and exhausted leaf would change from day to day.

Importers have imported the same grade of tea admitted during the previous season and found, to their consternation, that in the second season it was excluded, no reason being given beyond the inspector's or the arbitrator's impressions, which were without guide or standard of any kind. Consequently the importers have stood in constant danger of severe loss without remedy. The house of Purdon & Wiggin brought in about 5,000 packages, containing 40 pounds each, or, say, 200,000 pounds of Amoy tea, equal to millions of pounds imported for many years previous, but which were rejected after arbitration, causing the house a disastrous loss, which helped to bring about their final bankruptcy. A short time subsequently the same grade of tea, imported in large quantities by another house—say 10,000 packages, or more—was admitted after arbitration, thus giving an unfair advantage over the unfortunate competitor, both houses having imported in good faith, guided by what they had seen previously admitted.

This injustice, or series of injustices, has been going on for ten years. Not only the inspectors have no guide or standard by which to judge, but the arbitrators are likewise at sea, left entirely to their own vague impressions, which are constantly varying. It is a well-known fact that experts vary in their impressions of value, as proven continually by valuations of public auctions, in which the teas are never valued the same by different brokers, but frequently at 20 and 30 per cent. variation.

As many teas fit for use may have some quantity of adulterated or exhausted leaf, it is impossible to determine exactly where the line should be drawn.

Consequently some importer is always suffering injustice by having his teas rejected, which are fully equal to another's whose teas are admitted.

All this injustice may occur while inspectors or arbitrators are strictly honest, but without any standard or guide for their judgment. But it is difficult to estimate the disaster if any should not be honest. No inspector or arbitrator can be challenged because he has gone by his impressions, which the law allows. No two leaves of tea are exactly alike, and hence all could guess or decide as they choose without danger of being proven dishonest. Hence favoritism of all kinds has crept in. The arbitrators stand by their friends in many cases, inspectors by their impressions.

How arbitrations have failed.—The arbitrations have been in many cases a farce, and always variable and uncertain. The Government selects an arbitrator generally who is well known to be in favor of rigid exclusion. Importers select one generally known for great leniency in admitting everything. They seldom or never agree. Hence a long struggle to agree upon a third arbitrator who shall decide. In some cases a full month has elapsed before a third man can be agreed upon. The arbitrations with few exceptions result in leaving the decision to the third judge, who, like the inspectors, goes sometimes by his momentary impressions, which frequently contradict his own previous decision, or sometimes by motives of policy or friendship; in any case resulting in injustice either to importers or to the public.

The consequences of the present law.—The consequences of the present law are that millions of pounds of tea unfit for use are being constantly admitted. The public of the United States are now drinking the lowest average grade of tea ever before known, while many consumers are giving up tea altogether. The public are suffering; the importers

are suffering; and all because there is no standard or guide to govern the inspectors or arbitrators in the admission of the article.

The remedy.—After many years of injustice it is now proposed to amend the law so that the inspectors or arbitrators shall possess standards to guide them and thus admit and reject uniformly. Tne remedy proposed is to constitute a permanent committee or board of well-known merchants or experts to be appointed by the Secretary of the Treasury in the leading ports, whose duty it shall be to determine the lowest grade of tea fit for use, purchase enough of same for a standard, say, five packages of each kind, to enable all importers and inspectors to possess a sample for their guidance. The importers can send these samples to their correspondents in China and Japan and instruct that no lower grade can be shipped. Should teas below standards be brought in the inspectors shall reject them and the importers shall have the right to appeal to the permanent board of arbitrators appointed by the Government, whose duty it shall be to decide the simple question whether the tea is equal to the established standard or not, thus taking the inquiry out of the realm of imagination or guess work or vague impressions and reducing it to a simple test in which the tea in question is compared to the established standard and drawn side by side, under which circumstances any ordinary judge of tea can decide accurately.

It is also proposed to confine the ports of entry to the leading cities where experts can readily be found, instead of permitting the teas to be brought in through dozen of smaller places where it is almost an impossibility to find a board of judges.

The effect of the amendment.—(1) The inspectors, having a standard to guide them, will admit and exclude tea with justice and uniformity. (2) The arbitrators for the same reason will admit and ex-

clude with justice and uniformity. (3) The honest importer can conduct his business legitimately, without fear of injustice and unfair advantages upon the part of the arbitrators. (4) The tea trade of the United States will be benefited by having trash, which is ruining the business and which has for many years constituted the principal part of the surplus supply, effectually excluded. (5) The consumers of the United States will be protected as never before from the imposition upon them of worthless rubbish and be sure of receiving an article fit for use.

Who have advocated the amendment.—The petition for this amendment has been signed by all the leading importers of tea in the United States, representing all the capital invested in the tea business in first hands. The petitions have been signed by all the leading importers and wholesale houses of New York, Chicago, Boston, Philadelphia, Portland, Baltimore, and San Francisco. Several of these houses are interested in importations to the extent of over 100,000 packages per annum, several more over 50,000 packages, and few or none less than 10,000 packages per annum, therefore they represent the most interested and most intelligent opinion on the subject. In addition, the Collector of the Port of New York, and the Appraiser having witnessed these abuses and irregularities, have decidedly approved of this amendment. The Assistant Secretary of the Treasury at Washington, Mr. Hamlin, who has thoroughly investigated the subject, has also written his approval.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

THE UNITED STATES *ex rel.* GEORGE HAMILTON, GEORGE C. CHOLWELL, MOURILYAN HEINMAN COMPANY, RUSSELL & COMPANY, AVERILL & COMPANY and WILLIAM J. BUTTERFIELD, vs. LYMAN J. GAGE, Secretary of the Treasury; GEORGE HEWLETT *et al.*, composing the Board of Tea Experts appointed by said Lyman J. Gage.	Law No. 44,757.

Opinion of Mr. Justice Bradley.

The petitioners pray for a writ of *certiorari* directed to Lyman J. Gage, Secretary of the Treasury, and to George Hewlett and other defendants, composing the Board of Tea Experts, commanding them to certify to this Court for review the proceedings, decisions and actions of said Board of Tea Experts in selecting, preparing and submitting to the Secretary of the Treasury the standard samples of tea for the year 1901, and all communications received by the Board from the Secretary of the Treasury, the Assistant Secretary of the Treasury, or the Solicitor of the Treasury, instructing said Board as to its powers and duties, and commanding Lyman J. Gage, Secretary of the Treasury, to certify to this Court all of his decisions, actions, proceedings and regulations

in fixing and establishing the standards of teas for the year 1901, and pray also that the Secretary of the Treasury, and said Board shall "*certify and return*" (1), Whether or not the Secretary of the Treasury did instruct the said Board, and the said Board did receive from the said Secretary instructions that the Secretary of the Treasury was authorized to fix and establish standards which would exclude the lowest grades of teas, without considering the question of their purity or fitness for consumption. (2), Whether or not the said Board selected said standards and the Secretary of the Treasury fixed and established the same on the instruction and belief that the Secretary of the Treasury was by law authorized to fix and establish standards which would exclude the lowest, and "*certify and return*," really make answer to eight further interrogatories of like form.

The petition shows that the petitioners, as individuals or firms, are importers of teas doing business in the City of New York, and that the business of each is materially affected by the standards fixed of purity, quality and fitness for consumption admitted to import into the United States under the Act of Congress of March 2, 1897, entitled "An Act to prevent the importation of impure and unwholesome tea." That George Hewlett and the others named compose the Board of Tea Experts appointed for the year 1901 by the Secretary of the Treasury pursuant to that act. That in March, 1901, this Board, claiming to act under and by authority of that act, prepared and submitted to the Secretary of the Treasury standard samples of tea, and in the same month the Secretary of the Treasury did fix and establish certain standards of teas, which were thereupon announced and directed by regulation. That the Board, acting in excess of their jurisdiction and powers, selected sample standards of teas which exclude from importation teas that petitioners had dealt in and desired to deal in that are pure, wholesome and fit for consumption and use, and that the

Secretary of the Treasury established them as standards in violation of law and of the rights of the petitioners. That the Secretary of the Treasury assuming to act under the authority of the Act of Congress specified, as promulgated, certain regulalations to carry out its provisions recited in the petition, which he was without jurisdiction to make, which operate to the injury of petitioners.

The petition fails to allege the residences of the several members of the Board of Tea Experts, or their place of official meeting.

A rule to show cause was issued, which was served upon Lyman J. Gage, Secretary of the Treasury, but not upon the other respondents composing the Board of Tea Experts, as they are non-residents.

For return to the rule, the Secretary of the Treasury demurred to the petition.

The statute referred to in the petition provides in Section 1, that from and after May 1, 1897, "it shall be unlawful to import or bring into the United States any merchandise as tea, which is inferior in purity, quality and fitness for consumption to the standards provided in Section 3 of this Act, and importation of all such merchandise is hereby prohibited."

SEC. 2. That on or before February 15th of each year the Secretary of the Treasury shall appoint a board to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea.

SEC. 3. That the Secretary of the Treasury, upon the recommendation of the said Board, shall fix and establish uniformity of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the Custom Houses of the ports of New York, Chicago, San Francisco and such other ports as he may determine duplicate samples of such standards; that said Secretary shall procure a sufficient

number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports doing the same at cost. All teas or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the First section hereof.

The remaining sections of the act relate mainly to administration, and are not of importance to the consideration of the question raised by the demurrer, except the latter part of Section 7, which provides that in all cases of examination of teas sought to be imported "under the provisions of this act, the purity, quality and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis."

In plain terms, the statute requires the Board of Tea-Experts, whose appointment is provided for, to prepare and submit to the Secretary of the Treasury standard samples of tea, and requires the Secretary of the Treasury upon the recommendation of the Board to fix and establish uniform standards, and to deposit in the custom houses of various ports of the country, duplicate samples of the standards. The standard to be established is a sample of tea, not a descriptive regulation, and the question whether the tea brought into the country comes up to the standard, must be answered by a test that demonstrates the fact to the senses.

The duty of the Board of seven members, each of whom must be an expert in teas, is not to hear the importers, or to pass upon the merit of the teas that they severally handle, not to examine witnesses or to take testimony, but, using their expert knowledge, with the aid of their senses, to select samples of tea that in their judgment are of the purity, quality and fitness for consumption that justify their use as standards.

The duty of the Secretary of the Treasury is to

fix and establish standards upon the recommendation of the Board, and to cause duplicate samples of such standards to be placed in the several custom houses. His function appears to be executive.

The functions of the Board are not judicial.

The members are selected for their expert knowledge; they act upon their own inspection, and are at liberty to gain such information as they may require for the performance of their duty in any way, and from any available source. The examination of witnesses or the hearing of parties interested in the subject, or to be affected by the conclusions of the Board, is not contemplated by the statute.

Under Article 7, Section 8, Clause 3 of the Constitution of the United States, giving to the Congress power to regulate commerce with foreign nations, the power in that body to say just what teas, or whether any teas shall be imported into the United States, cannot be questioned. It is a part of the political power committed to it.

The fixing of standards of tea that may be imported would seem to demand specially equipped agents, such as the act in question authorized the Secretary of the Treasury to employ in aid of the duty imposed upon him. The performance of that duty by him, and the performance by the Board of its statutory duties involved the exercise of a part of the Government power, and the acts done are not subject to review by the courts.

Hughes *v.* Oaks, 59 Pa. St., 32–42.

The constitutionalty of the Act of Congress was conceded in argument at the hearing, and has been so adjudged.

Whether or not other reason exists for sustaining the demurrer, however, it must be sustained because neither the acts of the Secretary of the Treasury nor those of the Board, were judicial in their nature, and they cannot be reviewed upon *certiorari*.

Among the cases that might be cited in support

of this proposition, the following are deemed sufficient:

People *vs.* Bush, 40 Cal., 344.
People *vs.* Oakland, 54 Cal., 376.
Townshend *vs.* Copeland, 56 Cal., 612.
People *vs.* Supervisors of St. Lawrence Co., 25 Hun, 131.
People *vs.* McCarthy, 102 N. Y., 630.
People *vs.* Board of Health of Yonkers, 140 N. Y., 1.
Atty.-General *vs.* Northampton, 148 Mass., 589.
Devlin *vs.* Dalton, 171 Mass., 338.

The case of the People *vs.* Bush was an application for the writ of *certiorari* to review the proceedings of a county judge in appointing supervisors of the county. The Court held that "the appointment of the supervisors is, in its nature a ministerial and not a judicial act. Its nature is not dependent upon the quality or character of other acts which may be performed by the officer who makes the appointment. The writ does not extend to a mere ministerial act or proceeding though performed by a judicial officer."

In the case of the People *vs.* Oakland, the writ was sought to be used to review the action of a Board of Education in adopting certain text books for use in the public schools. The Board of Education of Oakland approved the report of a Committee that was in favor of adopting Appleton's series of readers. McGuffie's readers had been in use for a number of years prior thereto. The Court said "It is obvious that the defendant in its action with regard to the books to be used * * * was not exercising judicial functions. There was no party before it upon whose right it was passing with reference to any transaction whatever. Neither the party having a right to control the sale of one series of readers, or the other, was before it, prosecuting any right given to it by any law in existence. If present at

all, the party was there as any other person had a right to be, urging the policy of adopting the one series of readers, and the impolicy of adopting the other. The Board acted on the proposition before it as one of policy, or expediency, aiming to adopt that which in its judgment would be best for the constituency which it represented. Its action was then political or legislative and was in no proper sense judicial in its character. * * * To render it the exercise of a judicial function, its judgment must act in a matter which is judicial in the sense above indicated.

The case of the People *vs.* The Supervisors of St. Lawrence Co., was an application for a writ of *certiorari* to review the action of the Board of Supervisors of the county, delegating to a committee the locating and purchasing of a site for a children's home, the erection of a building and incurring an indebtedness therefor. The Court while holding that the Board was without power to delegate such authority, said:

"It is sought by this proceeding to review acts which are entirely legislative, executive and ministerial in character. The selection of a site for a Home, the incurring of expense in its purchase, the erection of an edifice thereon and the manner of its erection and the extent of the entire expenditure, rested in the discretion and judgment of the Board, and was legislative in character rather than judicial; as was indeed the subject itself, whether or not a site should be procured and an erection made. The carrying out and into effect, the determination, when made, would be executive and ministerial. There was nothing of a judicial character in the exercise of the power and authority of the Board over the subject. The action of the Board in that regard could not, therefore, be reviewed by *certiorari*.

In the case of the People *vs.* McCarthy, was an application for a writ of *certiorari* to review proceedings of the State Board of Equalization in

equalizing the apportionment of property within the State between the several counties for the purposes of taxation. The Court held that judicial review of conclusions based mainly if not exclusively upon the mental operations and the individual knowledge and qualifications of the persons composing the tribunals referred to, is obviously impracticable if not impossible" by *certiorari*.

The case of the People *vs.* the Board of Health of Yonkers was an application for a writ of *certiorari* to review the proceedings of the Board of Health in condemning mill ponds as nuisances. In its opinion the Court said:

"The Board of Health did act, and had a right to act upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party.

It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by *certiorari*," citing People *vs.* McCarthy, 102 N. Y., 630.

The case of the Attorney-General *vs.* Northampton was an application for a writ of *certiorari*, filed by the Attorney-General at the instance of the Civil Service Commission. In that case the Court held that

"The appointment of police officers by the municipal authorities of a city cannot, in any just sense, be called a judicial proceeding. It is an important administrative duty, and like most administrative duties involves the exercise of judgment and discretion; but it is administrative and not judicial in its character. No one has the right to be heard, and their decision is not, within the meaning of the law, an adjudication or judicial determination of any question or of the rights of the parties.

The case of Devlin *vs.* Dalton was an application for a writ of *certiorari* to review the proceedings of the Board of Military Examiners, discharging the petitioner from the position of Captain of Volun-

teers. The Court, citing the case of the Attorney-General *vs.* Northampton, said:

"Since in these proceedings the Board of Examiners did not act as a Court, the petition must fail because a writ of *certiorari* is issued only to review proceedings which are judicial in their nature."

The demurrer must be sustained and the writ denied.